BEFORE THE ADJUDICATING OFFICER

SECURITIES AND EXCHANGE BOARD OF INDIA

ADJUDICATION ORDER NO. Order/AA/RK/2022-23/20965-20973

UNDER SECTION 15-I OF SECURITIES AND EXCHANGE BOARD OF INDIA ACT, 1992 READ WITH RULE 5 OF THE SECURITIES AND EXCHANGE BOARD OF INDIA (PROCEDURE FOR HOLDING INQUIRY AND IMPOSING PENALTIES) RULES, 1995

In respect of:

Sr. No.	Name of the Entity	PAN
1	Mr. R.A. Shah	ABIPS1839C
2	Mr. S.S. Kelkar	AAFPK0864R
3	Mr. S. Ragothaman	AAFPR6833B
4	Mr. S.M. Palia	AABPP2138D
5	Mr. Ishaat Hussain	AAVPH6348F
6	Mr. Raghuraj Balakrishna	AFJPR6883G
7	Mr. Vinod Hiran	AAJPH1665F
8	Mr. Puspamitra Das	ABLPD3066D
9	Mr. Vishnu Peruvamba	ALAPS3550J

(*The aforesaid 9 entities are hereinafter being individually referred to as Noticee No. 1 to 9 respectively and collectively referred to as "**Noticees",** unless the context specifies otherwise)*

In the matter of Bombay Dyeing and Manufacturing Company Limited

BACKGROUND OF THE CASE

1. The Securities and Exchange Board of India (hereinafter referred to as "SEBI") conducted an investigation to ascertain whether the books of accounts of Bombay Dyeing and Manufacturing Company Limited (hereinafter referred to as "BDMCL") were manipulated for the financial years beginning from FY 2011-12 up to FY 2018-19 (hereinafter referred to as "Investigation Period" / "IP"). The investigation revealed that BDMCL, by entering into various Memoranda of Understanding (hereinafter referred to as "MoUs") with Scal Services Limited (hereinafter referred to as "Scal") (a Group Company of BDMCL whose entire shareholding was directly/ indirectly held by BDMCL) during FY 2011-12 to FY 2017-18 and by subsequently

recognizing revenue on the basis of aforesaid MoUs and not consolidating the transactions carried out with Scal, had inflated its sales and profits with respect to its real estate segment during FY 2011-12 to FY 2017-18 to the tune of Rs. 2,492.94 crores and Rs. 1,302.20 crores respectively.

2. In this regard, it was observed by SEBI, during the course of investigation that Mr. R.A. Shah (Noticee no. 1), Mr. S.S. Kelkar (Noticee no. 2), Mr. S. Ragothaman (Noticee no. 3), Mr. S.M. Palia (Noticee no. 4), Mr. Ishaat Hussain (Noticee no. 5), Mr. Raghuraj Balakrishna (Noticee no. 6), Mr. Vinod Hiran (Noticee no. 7), Mr. Puspamitra Das (Noticee no. 8) and Mr. Vishnu Peruvamba (Noticee no. 9) (collectively referred to as "the Noticees") have allegedly violated the provisions of Securities and Exchange Board of India Act, 1992 (hereinafter referred to as "SEBI Act"), Securities and Exchange Board of India (Listing Obligations and Disclosure Requirements) Regulations, 2015 (hereinafter referred to as "LODR Regulations") and the Erstwhile Listing Agreement during the period between April 1, 2011 and March 31, 2018.

APPOINTMENT OF ADJUDICATNG OFFICER

3. The undersigned has been appointed as the Adjudicating Officer in the matter vide communique dated July 23, 2021, to inquire into and adjudge the aforesaid violation alleged to have been committed by the Noticees, in terms of Rule 4 of the SEBI (Procedure for Holding Inquiry and Imposing Penalties) Rules, 1995 (hereinafter referred to as "Adjudication Rules") read with Section 15-I of the SEBI Act, and impose such penalty on the Noticees, as deemed fit, in terms of Rule 5 of the Adjudication Rules read with section 15HB of the SEBI Act.

SHOW CAUSE NOTICE, REPLY AND PERSONAL HEARING

4. A common Show Cause Notice dated August 30, 2021 (hereinafter referred to as "SCN") was issued against the Noticees. The SCN was issued under Rule 4 (1) of the Adjudication Rues to show cause as to why inquiry should not be initiated against the Noticees, and penalty should not be imposed under the provisions of Section 15HB

of the SEBI Act, 1992. The following documents were enclosed as annexures to the SCN.

Table No. 1

Annexures to SCN	
Annexure	**Particulars**
Annexure A	Copy of the Communique dated July 23, 2021
Annexure 1	Copy of reply dated September 15, 2020 submitted by BDMCL
Annexure 2	Copies of 11 MoUs entered between BDMCL and Scal
Annexure 3	Copies of Auditor's Report submitted for FYs 2011-12 to 2017-18
Annexure 4	Copy of letter dated February 12, 2021 submitted by the Statutory Auditor of BDMCL
Annexure 5	Copy of email dated March 1, 2021 sent by BDMCL
Annexure 6	Copy of statement recorded on January 21, 2021 of Shri NH Datanwala
Annexure 7	Copy of letter dated September 14, 2015 received from Scal
Annexure 8	Copy of letters dated October 17, 2019 received from BDMCL
Annexure 9	Copy of letter dated March 8, 2021 received from BDMCL
Annexure 10	Copy of email dated February 5, 2021 received from BDMCL
Annexure 11	Copy of Valuation report dated August 01, 2018 issued by Walker Chandiok & Co. LLP
Annexure 12A to 12E	Copies of submissions made by Shri R A Shah, Shri S S Kelkar, Shri S. Ragothaman, Shri S M Palia and Shri Ishaat Hussain, respectively
Annexure 13A to 13D	Copies of submissions made by Shri Raghuraj Balakrishna, Shri Vinod Hiran, Shri Puspamitra Das and Shri Vishnu Peruvamba

5. The SCN was served on all the Noticees except Noticee no. 6 and 9 through speed post. As regards Noticees nos. 6 and 9, the SCN was served through digitally signed email.

6. The main observations and allegations against the Noticees raised in the SCN are as under:

   (a) The SCN has alleged that BDMCL has executed a scheme with Scal whereby BDMCL has artificially inflated its sales and profits by booking non- genuine sales of flats in its construction projects namely, Project One ICC and Project Two ICC, Dadar, Mumbai under 11 MoUs.

   (b) The role of the Noticees during the Investigation Period is as under:

Table No. 2

Name of the Noticee (Noticee no.)	**Role of the Noticee**	**Begin Date**	**End Date**	**Details**
Mr. R A Shah (1)	Independent Director of BDMCL	Before IP	August 08, 2019	Member of the Audit Committee (From FY 2011-12 to FY 2017-18)
Mr. S S Kelkar (2)	Independent Director of BDMCL	Before IP	August 07, 2018	Member of the Audit Committee (From FY 2011-12 to August 07, 2018)
Mr. S. Ragothaman (3)	Independent Director of BDMCL	Before IP	Not Applicable	Chairman of the Audit Committee from FY 2011-12 till November 13, 2013. Member of the Audit Committee thereafter till FY 2018-19.
Mr. S M Palia (4)	Independent Director of BDMCL	Before IP	August 07, 2018	Member of the Audit Committee (From FY 2011-12 to August 07, 2018)
Mr. Ishaat Hussain (5)	Independent Director of BDMCL	Before IP	August 10, 2017	Chairman of the Audit Committee from November 14, 2013 till August 10, 2017
Mr. Raghuraj Balakrishna (6)	Chief Financial Officer of BDMCL	October 22, 2012	August 08, 2014	Signed the CFO Certification for BDMCL required under Clause 49(V) of the Listing Agreement for FY 2012 – 13 and 2013 – 14.
Mr. Vinod Hiran (7)	Chief Financial Officer of BDMCL	May 19, 2015	November 02, 2015	Signed the CFO Certification for BDMCL required under Clause 49(IX) of the Listing Agreement for FY 2014 - 15.
Mr. Pushpamitra Das (8)	Chief Financial Officer of BDMCL	April 04, 2016	June 30, 2017	Signed the CFO Certification for BDMCL required under Regulation 17(8) of SEBI (LODR) Regulations, 2015 for FY 2015 – 16 and FY 2016 – 17.
Mr. Vishnu Peruvemba (9)	Chief Financial Officer of BDMCL	January 05, 2018	August 31, 2019	Signed the CFO Certification for BDMCL required under FY 2017 - 18.

(c) Mr. R A Shah, Mr. S S Kelkar, Mr. S Ragothaman, Mr. S M Palia and Mr. Ishaat Hussain failed to carry out adequate due diligence and exercise independent judgment as members of the Audit Committee of a listed company i.e. BDMCL, to ensure that financial statements are free from material misstatement. It is, therefore, alleged that the aforesaid Noticees did not comply with the provisions of Clause 49(II)(D)(1) of the Listing Agreement, Clause 49(III)(D)(1) of the Listing Agreement (post amendment dated April 17, 2014) read with Regulation 103 of the SEBI (LODR) Regulations, 2015 and Regulation 18(3) read with Clause A (1) under Part C of Schedule II of SEBI (LODR) Regulations, 2015.

(d) Mr. Raghuraj Balakrishna, Mr. Vinod Hiran, Mr. Puspamitra Das and Mr. Vishnu Peruvamba, in their capacities as CFOs of BDMCL have issued certificate in the Annual Reports of BDMCL during the IP *inter alia* certifying that the financials of BDMCL presented true and fair view of its affairs and did not contain any misleading statement. In view thereof, the aforesaid Noticees are alleged to have violated the respective relevant provisions of securities laws, as given below:

(i) Mr. Raghuraj Balakrishna violated the provisions of then applicable provisions of Clause 49 (V) of the Listing Agreement;

(ii) Mr. Vinod Hiran violated Clause 49 (IX) of the Listing Agreement (post amendment dated 17/04/2014) read with Regulation 103 of the SEBI (LODR) Regulations, 2015 and

(iii) Mr. Pushpamitra Das and Mr. Vishnu Peruvemba violated Regulation 17(8) & 33(2)(a) of the SEBI (LODR) Regulations, 2015.

<u>Inspection of documents:</u>

7. Vide email/ letter dated September 16, 2021, Noticee no. 2, 3, 5 sought inspection of all the relevant documents. Noticee no. 4 vide email/ letter dated September 17, 2021 sought inspection of all the relevant documents. In this regard, vide email dated September 27, 2021, the Noticees were informed that all the necessary documents which have been relied upon have been provided as Annexures to the SCN and the original of the said documents would be made available for inspection of documents on October 04, 2021. Thereafter, Mr. Arun Unnikrishnan, Advocate and Mr. Prakash

Khati, Advocate inspected the documents on October 04, 2021 on behalf of Noticee nos. 1, 2, 3, 4, 5, 6 and 9.

8. Noticee no. 8 vide email dated October 04, 2021 sought inspection of documents who was informed vide email dated October 11, 2021 that an opportunity to inspect the documents would be granted on October 13, 2021.

9. On March 14, 2022, the Authorized Representative (hereinafter referred to as the "AR") of the Noticees while relying on the judgment of the Hon'ble Supreme Court in ***T. Takano* v. *SEBI*** (Civil Appeal nos. 487 – 488 of 2022) sought copies of the record pertaining to the investigation carried out by or on behalf of SEBI, prior to the issuances of the SCN. I note that none of the Noticees while availing inspection in October 2021, had requested for inspection of the records pertaining to the investigation, however, in the interest of equity, transparency and fairness, an inspection of the relevant documents was scheduled on April 25, 2022 which was communicated to the AR vide email dated April 21, 2022. Due to prior court commitments of the AR, the same had to be rescheduled to April 27, 2022. During the inspection on April 27, 2022, the AR inspected the complete investigation report in the matter of BDMCL along with its annexures. Further, copies of the investigation report and its annexures were also provided to the AR.

<u>Replies received from Noticees</u>

10. Noticee nos. 2, 3, 5 vide email / letter dated September 16, 2021 and Noticee no. 6 vide email / letter dated September 17, 2021 had sought an extension of 7 weeks to submit their response to the SCN on the ground that the alleged violations were in connection with transactions which had taken place almost a decade ago and that the Noticees were in process of collating the necessary information.

11. Vide email / letter dated September 17, 2021, Noticee no. 4 submitted that he received the SCN on September 05, 2021 at his Ahmedabad residence and that he is travelling and would be returning to Ahmedabad on October 05, 2021. Furthermore, as the alleged violations were in connection with transactions which had taken place almost

a decade ago, hence, the Noticee requested an extension of time till end of November 2021 to submit his response.

12. Vide letter/ email dated October 30, 2021, Noticee no. 5 and 9 submitted their replies. Further, vide letter/ email dated November 01, 2021, Noticee nos. 1, 2, 3, 4, 6, 7 and 8 submitted their replies.

Hearing:

13. A hearing was scheduled on November 16, 2021 at 02:30 PM through WebEx which was communicated to the Noticees vide email dated November 03, 2022. Vide separate letters / emails dated November 11, 12 and 13, 2021, the Noticees sought an adjournment of the hearing scheduled on November 16, 2021. Vide letters/ emails dated December 06, 2021, the Noticee requested for further adjournment of the hearing scheduled on December 08, 2022 and requested that the hearing in the matter may be scheduled to any date in the week commencing from January 24, 2022. Accordingly, hearing in the matter was scheduled on January 27, 2022 which was communicated to the Noticees vide email dated December 07, 2021.

14. However, the AR of the Noticees sought an adjournment vide letter/ email dated January 24, 2022 which was granted and hearing in the matter was scheduled on February 08, 2022 which again had to be rescheduled to February 09, 2022 due to certain administrative exigencies and was communicated to the authorized representative of the Noticees, Mr. Parth Shah vide email dated February 05, 2022. In this regard, the authorized representative of the Noticees, replied vide email dated February 07, 2022 that the hearing scheduled for February 09, 2022 may be rescheduled as the same was not convenient to the Counsels appearing on behalf of the Noticees as they had prior court commitments on the said date. Thereafter, the hearing was scheduled on February 11, 2022 which was attended by the authorized representatives of the Noticees who submitted that the 11B proceedings are pending in the matter and sought additional time to provide a consolidated response in addition to the responses already provided by the Noticees vide letters/ emails dated October 30, 2021 and November 1, 2021. The AR of the Noticees vide email dated February

11, 2022 was provided three weeks' time to submit their response and informed that the next date of hearing would be communicated pursuant to the receipt of the response.

15. Vide letter/ email dated March 04, 2022, the AR requested for extension of two weeks to submit the aforesaid consolidated response. Vide email dated April 27, 2022, the Noticees were directed to file their consolidated response on or before May 10, 2022 and personal hearing was granted on May 17, 2022. The Noticees vide letter dated May 06, 2022 sought an adjournment on the ground of non-availability of Counsel due to vacation of the Bombay High Court. Vide email dated May 17, 2022, hearing in the matter was scheduled on June 13, 2022 which was adjourned on the request of the AR of the Noticees. A Consolidated Advance Written Submissions dated May 30, 2022 on behalf of all the Noticees.

16. The hearing scheduled on June 30, 2022 was concluded qua all the Noticees. Thereafter, the Noticees submitted Written Submissions dated July 11, 2022. In furtherance of the judgment passed by the Hon'ble Supreme Court in *SEBI v. Sunil Krishna Khaitan & Ors.*[1], the Noticees submitted their Written Submissions dated August 03, 2022.

CONSIDERATION OF ISSUES AND FINDINGS

17. Based on the SCN, replies of the Noticees, their written and oral submissions and the material available on record, the following issues arise for consideration:

    I. *Whether the Noticee nos. 1 to 5 have failed to comply with provisions of Clause 49(II)(D)(1) of the Listing Agreement, Clause 49(III)(D)(1) of the Listing Agreement (post amendment dated April 17, 2014) read with Regulation 103 of the SEBI (LODR) Regulations, 2015 and Regulation 18(3) read with Clause A (1) under Part C of Schedule II of SEBI (LODR) Regulations, 2015?*

    II. *Whether the Noticee nos. 6 to 9 respectively have violated Clause 49(V) of the Listing Agreement, Clause 49(IX) of the Listing Agreement (post amendment*

[1] Civil Appeal No. 8249 of 2013. Judgment was passed on July 11, 2022.

dated 17/04/2014) read with Regulation 103 of the SEBI (LODR) Regulations, 2015 and Regulation 17(8) & 33(2)(a) of the SEBI (LODR) Regulations, 2015?

III. *Does the violation, if any, by the Noticees attract monetary penalty under Section 15 HB of the SEBI Act?*

IV. *If so, what should be the monetary penalty that can be imposed taking into consideration the factors mentioned in Section 15J of the SEBI Act?*

18. I proceed to deal with the Issues raised for consideration in the present matter.

Issue No. I: Whether the Noticee nos. 1 to 5 have failed to comply with provisions of Clause 49(II)(D)(1) of the Listing Agreement, Clause 49(III)(D)(1) of the Listing Agreement (post amendment dated April 17, 2014) read with Regulation 103 of the SEBI (LODR) Regulations, 2015 and Regulation 18(3) read with Clause A (1) under Part C of Schedule II of SEBI (LODR) Regulations, 2015?

&

Issue No. II: Whether the Noticee nos. 6 to 9 respectively have violated Clause 49 (V) of the Listing Agreement, Clause 49(IX) of the Listing Agreement (post amendment dated 17/04/2014) read with Regulation 103 of the SEBI (LODR) Regulations, 2015 and Regulation 17(8) & 33(2)(a) of the SEBI (LODR) Regulations, 2015?

A. Scheme of BDMCL to inflate its sales

19. I note that BDMCL is part of the Wadia Group of companies[2] and is engaged in the business of real estate, polyester and retail/ textile. The equity shares of the company are listed at the Bombay Stock Exchange Ltd. and the National Stock Exchange of India Ltd. Further, I note that Scal is a public unlisted company incorporated in 1983 and engaged in business of real estate and trading.

[2] As per the website www.wadiagroup.com, Wadia Group of companies consists of a number of companies which own brands like Britannia, Bombay Burmah, Bombay Dyeing, Bombay Realty and Go Air etc.

20. I note from the SCN that during the Investigation Period, the entire shareholding of Scal was held by BDMCL, Bombay Dyeing Real Estate Company Limited ("BDRECL"), Pentafil Textile Dealers Limited ("Pentafil"), Archway Investment Company Limited ("Archway"), BDS Urban Infrastructures Pvt Ltd ("BDS") and Springflower Investments Pvt Ltd ("Springflower") which were the companies of the Wadia Group. The table below provides the shareholding pattern of Scal and its major shareholders from 2010-11 onwards (shareholding as on March 31 of the FY):

Table No. 3

	2010-11	**Shares held in**		
	Shares held by ↓	**Scal**	**Pentafil**	**Archway**
1	Scal	-	25.50%	25.50%
2	Pentafil	25.50%	-	25.50%
3	Archway	25.50%	25.50%	-
4	BDMCL	49%	49%	49%
	Total	**100%**	**100%**	**100%**

Table No. 4

	2011-12 and 2012-13	**Shares held in**			
	Shares held by ↓	**Scal**	**Pentafil**	**BDRECL**	**Archway**
1	Scal	-	25.50%	10%	25.50%
2	Pentafil	25.50%	-	40%	25.50%
3	BDRECL	30%	-	-	-
4	Archway	25.50%	25.50%	10%	-
5	BDMCL	19%	49%	40%	49%
	Total	**100%**	**100%**	**100%**	**100%**

Table No. 5

	2013-14	**Shares held in**					
	Shares held by ↓	**Scal**	**Pentafil**	**BDRECL**	**Archway**	**BDS**	**Springflower**
1	Scal	-	25.50%	10%	25.50%	-	
2	Pentafil	19%	-	40%	25.50%	81%	
3	BDRECL	19%	-	-	-	-	
4	Archway	19%	25.50%	10%	-	-	
5	BDS	19%	-	-	-	-	
6	Springflower	5%	-	-	-	-	-
7	Havenkores Real Estate Pvt. Ltd	-	-	-	-	-	100%
8	BDMCL	19%	49%	40%	49%	19%	
	Total	**100%**	**100%**	**100%**	**100%**	**100%**	**100%**

Table No. 6

	2014-15 to 2017-18	**Shares held in**				
	Shares held by ↓	**Scal**	**Pentafil**	**BDRECL**	**BDS**	**Springflower**

1	Scal	-	45.50%	45%	47%	-
2	Pentafil	19%	-	-	19%	-
3	BDRECL	19%	-	-	15%	-
4	BDS	38%	5.50%	15%	-	-
5	Springflower	5%	-	-	-	-
6	Havenkores Real Estate Pvt. Ltd	-	-	-	-	100%
7	BDMCL	19%	49%	40%	19%	-
	Total	**100%**	**100%**	**100%**	**100%**	**100%**

Table No. 7: *Shareholding of Havenkores Real Estate Pvt. Limited as on March 31, 2018*

S. No.	Name of Shareholder	Shares held in Havenkores	%
1	Nessville Trading Private Ltd.	15000	61.98%
2	Nowrosjee Wadia & Sons Ltd	5000	20.66%
3	Mr. Ness Wadia	1600	6.61%
4	Mr. Jeh Wadia	1600	6.61%
5	Mrs. Bachoobai Woronzow	1000	4.13%
	Total	**24200**	**100**

21. I note that in FY 2010 – 11, BDMCL held 49% of the equity share capital of Scal and continued to hold the same percentage in FY 2011 - 12 till March 28, 2012. However, on March 29, 2012, BDMCL sold 30% of its equity share capital in Scal to BDRECL[3], a group company of BDMCL for merely Rs. 48 Lakhs, thereby, bringing down its shareholding in Scal to 19%.

22. It is pertinent to note that although, during FY 2011-12 to FY 2018-19, BDMCL held 19% of the equity share capital of Scal, the remaining shareholding of Scal was held by other Wadia Group companies namely, Pentafil (19%), BDRECL (19%), Archway (19% in FY 2013 – 14), BDS (38% from FY 2014 - 15), and Springflower. I also note that, each of these Wadia Group companies (except Springflower), had cross-holding amongst themselves. For example, in FY 2013-14, shares of Pentafil were held by Scal (25.50%), Archway (25.50%) and BDMCL (49%); shares of Archway were held by Scal (25.50%), Pentafil (25.50%) and BDMCL (49%); shares of BDRECL were held by Scal (10%), Archway (10%), Pentafil (40%) and BDMCL (40%).

[3] During the entire Investigation Period, the share capital of BDRECL is held by BDMCL (40%), Pentafil (40%), Scal (10%) and Archway (10%).

23. From the shareholding pattern of the said Wadia Group of companies, I find that, each of these companies were completely held, at any given point in time, in varying proportions, by two or more of the other members of the group. The single common shareholder for these companies, however, at all times throughout the Investigation Period, was BDMCL. Therefore, I find that during the investigation period, BDMCL held the entire share capital of Scal directly as well as indirectly through other group companies.

24. I note that during the investigation period, the real estate developers, such as BDMCL, were required to recognize revenue from real estate activity in the financial statements in accordance with the "Percentage of Completion Method" as provided in the **Accounting Standard – 7** (hereinafter referred to as "AS – 7") titled "Construction Contracts". The Percentage of Completion Method under AS-7 requires that *when the outcome of a construction contract can be estimated reliably, contract revenue and contract costs associated with the construction contract should be recognised as revenue and expenses respectively by reference to the stage of completion of the contract activity at the reporting date.* However, before recognition of revenue in accordance with AS-7 as above, an entity is required to satisfy the conditions specified in Guidance Note on Recognition of Revenue by Real Estate Developers (hereinafter referred to as "Guidance Note 2006") which has been issued by the Institute of Chartered Accountant of India (hereinafter referred to as "ICAI"). The Guidance Note, 2006 requires following three conditions to be complied with before recognition of revenue by real estate developers:
    (a) transfer of all significant risks and rewards of ownership to the buyers;
    (b) not unreasonable to expect ultimate collection and
    (c) non-existence of significant uncertainty regarding the amount of consideration.

25. I note that in accordance with the same, BDMCL, in its annual reports for every financial year, mentioned that 'the revenue from real estate is recognized on the transfer of all significant risks and rewards of ownership to the buyers, and further stated that it is not unreasonable to expect ultimate collection and that there exists no significant uncertainty regarding the amount of consideration'. I note that paragraph 7 of the Guidance Note 2006 further states that all significant risks and rewards of

ownership are considered to be transferred *inter alia*, if the seller has entered into a legally enforceable agreement for sale with the buyer. The said paragraph 7 is reproduced as follows:

> *"The determination of point of time when all significant risks and rewards of ownership are transferred depends on the facts and circumstances of each case considering the terms and conditions of the agreement. In case of real estate sales, all significant risks and rewards of ownership are considered to be transferred when legal title passes to the buyer (e.g., at the time of the registration, with the relevant authorities, of the real estate in the name of the buyer) or when the seller enters into an agreement for sale and gives possession of the real estate to the buyer under the agreement. <u>All significant risks and rewards of ownership are also considered to be transferred, if the seller has entered into a legally enforceable agreement for sale</u> with the buyer and ALL the following conditions are satisfied even though the legal title is not passed or the possession of the real estate is not given to the buyer:*
>
> *(a) The significant risks related to real estate have been transferred to the buyer. In case of real estate, price risk is generally considered to be one of the most significant risks.*
>
> *(b) The buyer has a legal right to sell or transfer his interest in the property, without any condition or subject to only such conditions which do not materially affect his right to benefits in the property."*

26. In order that to show that the risks and rewards of ownership have been transferred to the buyers, BDMCL entered into a Memorandum of Understanding (MoU) with Scal for purchase of flats/allotment rights in Project One ICC and Project Two ICC, Dadar, Mumbai. A total of 11 MoUs were entered into between BDMCL and Scal as shown in Table No. 8.

Table No. 8

MoU No.	MoU Date	Project	No. of Flats sold	Consideration for sale (Rs. in Crores)
1	March 30, 2012	One ICC	52	450
2	March 30, 2012	Two ICC	40	293
3	June 30, 2012	One ICC	9	82
4	June 30, 2012	Two ICC	8	61
5	September 27, 2012	One ICC	5	46
6	December 31, 2012	One ICC	10	91
7	March 29, 2013	One ICC	18	189
8	March 29, 2013	Two ICC	25	233
9	June 28, 2013	One ICC	12	127
10	March 27, 2014	One ICC	50	523
11	March 27, 2014	Two ICC	96	938
Total			**325**	**3,033**

27. I note from the Annual Reports of FY 2011-12 to FY 2017-18 that BDMCL recognized revenue and operating profit of Rs. 4,429.57 crores and Rs. 2,317.54 crores respectively for real estate segment during FY 2011-12 to FY 2017-18, out of which the revenue and profit amounting to Rs. 2,492.94 crores and Rs. 1,302.20 crores respectively were recognized on the basis of MoUs entered into with Scal as shown below:

Table No. 9

FY (A)	Revenue for real estate segment (Rs. in crores) (B)	Recognition of revenue based on MoU entered with Scal (Rs. In crores) (C)	% of revenue recognized from Scal (D=C/B*100)	Operating Profit for Real Estate Segment (Rs. in crores) (E)	Profit Before Tax on sales made to Scal under MoUs (Rs. in crores) (F)	Page of Annual Report (G)
2011-12	566.27	341.32	60%	268.58	Not provided	56
2012-13	665.70	339.47	51%	349.61	203.96	33
2013-14	803.28	670.13	83%	372.46	355.45	41
2014-15	444.23	301.11	68%	302.69	224.49	53
2015-16	470.23	239.26	51%	277.20	158.63	56
2016-17	296.95	156.07	53%	160.57	102.63	53
2017-18	1182.91	445.58	38%	586.43	257.04	68
2018-19	The real estate business undertaking of Scal got merged with BDMCL					
Total	**4429.57**	**2492.94**	**56%**	**2317.54**	**1302.20**	

28. As noted earlier above, in order to show that the transaction with the buyer, Scal, was being done on an arm's length basis, on March 29, 2012, BDMCL sold 30% of its equity share capital in Scal to BDRECL, a group company of BDMCL for Rs. 48 Lakhs, thus, bringing down its shareholding in Scal to 19% from 49%. Interestingly, immediately pursuant to selling 30% of its shareholding in Scal on March 29, 2012, BDMCL entered into two MoUs on March 30, 2012 for sale of flats in its construction projects for a total consideration of Rs. 743 Crores. The timing of the stake sale and MoUs indicates that the same was done with the purpose of recognizing revenue and consequent profits.

29. I note that the Noticees have relied on the following terms of the MoUs to show that the same were genuine and not fraudulent:

    (a) The purchaser i.e. Scal agreed to purchase the apartments for which the consideration specified in the MoUs was to be paid by it. The terms of payment

were also fixed under the MoUs. During the period of the transactions, at no point did Scal willfully default on any if its obligations to BDMCL. Pursuant to those transactions and between the period starting from FY 2011- 12 and ending FY 2013-14, Scal paid BDMCL an aggregate sum of Rs. 457 crores. Where any amount was delayed, Scal duly paid interest thereon.

(b) Delays in payment attracted interest, and over the IP, BDMCL realized a total of Rs. 3,72,03,095/- towards the same from Scal.

(c) The MoUs specifically confirmed between the parties that although the apartments were yet to be constructed, all the risks and rewards attached to the apartments would be that of the purchaser from the date of execution of the MoUs and the obligation of the purchaser to pay the balance consideration as stated in the Subject MoUs to the developer was final and absolute.

(d) It was agreed the MoUs were legally binding on both the parties and enforceable under law.

(e) It was agreed that in case of any further sale of an apartment to a new purchaser, any surplus/ profit or loss/ deficit earned or incurred by the purchasers on such further sale, would belong to and be due to the purchasers entirely.

(f) It was agreed that if the purchaser failed to make payments, then the developer i.e. BDMCL reserved the right to cancel/ terminate the MoUs by giving notice, in which case the arrangement contained in the MoU would come to an end.

30. The Noticees have also stated that the terms and conditions for sale of the apartments under the MoUs were almost similar to the terms and conditions agreed with other retail buyers. The Noticees have also stated that based on the said terms and conditions, it is their case that all the risks and rewards of ownership were transferred to the buyer.

31. I note that cumulative revenue recognized and cumulative billing made in respect of Scal by BDMCL is shown in Table 10 below.

Table No. 10

S. No.	FY	Revenue Recognized	Cumulative Revenue Recognized	Billing Made	Cumulative Billing made	Cumulative payment received
1	2011-12	341.32	341.32	23	23	25
2	2012-13	339.47	680.79	89	112	131.34
3	2013-14	670.13	1,350.92	119	231	262
4	2014-15	301.11	1,652.03	258	489	436.29
5	2015-16	239.26	1,891.29	-267	222	215.94
6	2016-17	156.07	2,047.36	4	226	259.24
7	2017-18	445.58	2,492.94	-16	210	261.24
	Total	**2,492.94**		**210**		

32. I note from table no. 10 that till FY 2014-15, BDMCL recognized revenue of Rs. 1,652.03 crores with respect to sales made to Scal under various MoUs. Also, till FY 2014-15, BDMCL had billed Scal cumulatively up to Rs. 489 crores and the amount received by BDMCL stood at Rs. 436 crores. Thereafter, it is noted that on the basis of a request letter dated September 14, 2015 received from Scal (Annexure 7 to SCN), BDMCL made a refund of Rs. 270.35 crore to Scal even though the amount billed to Scal was already greater (i.e. Rs.489 Crores) than the amount received from Scal (i.e. Rs. 436 Crores). BDMCL also agreed to observe a moratorium with respect to Scal for making payments till June 2017. I note that as an explanation, in its Annual Report for FY 2015-16, BDMCL stated that considering that Scal was a bulk customer who had purchased a large number of flats and had not received the discounts given to other bulk purchasers and on account of Scal’s inability to sell the flats due to delay in construction by BDMCL, the Company reduced the advance payments made by Scal to 7.5% resulting in refund of about Rs. 270.35 crores to Scal. However, I also note that BDMCL has also admitted that similar refunds were not provided to any other bulk dealer (Annexure 8 to SCN).

33. I note that the Noticees in their replies have stated that during the period starting from FY 2015-16, there was a major slowdown in the real estate sector, BDMCL was also involved into litigation as a result of which the construction of the projects was halted for approximately 2 years on account of a Stop Work Notice issued on the site of construction. The Noticees have submitted that given the aforesaid circumstances, BDMCL granted deferment of milestone payments to Scal, more so, as it received all the payments from Scal till 2013 -14 as per the prescribed milestones and reduced the advance payment made by Scal to 7.5 % resulting in refund of about Rs. 270.35 Crores to Scal, which was decided in meeting of the Board of Directors of BDMCL held on December 18, 2015.

34. I note from the Investigation Report that the table below provides the % of payment received in relation to revenue recognized by BDMCL from various bulk buyers including Scal, as provided by the Statutory Auditor vide email dated February 12, 2021.

Table No. 11

FY	Scal	Purushottam	Ghevarchand
2011-12	3%	5%	5%
2012-13	13%	7%	7%
2013-14	11%	10%	10%
2014-15	19%	10%	10%
2015-16	9%	22%	20%
2016-17	12%	54%	54%
2017-18	14%	86%	86%

35. It is noted from the submissions dated February 25, 2021 made by Noticee no. 2, Mr. S S Kelkar that BDMCL and Scal decided commercially in their best judgment to observe a moratorium until the market condition improved in the real estate sector. I note that admittedly no other bulk buyers had requested for similar deferment as sought by Scal. I find it hard to fathom that if the market condition of real estate sector was not in a good shape, other bulk buyers would have also faced the same difficulties. However, the table above shows that the other bulk buyers were paying the amounts due in terms of their respective MoUs as per the milestones chalked out thereunder and had paid almost 86% of the amount due under their respective agreements.

36. Having noted the above, I note that Scal did not have the capacity to pay for the flats sold to it under the MoUs. Scal was having negative net worth of approximately Rs. 3 crores as on March 31, 2012 when BDMCL entered into two (2) MoUs dated March 30, 2012 for consideration of Rs. 743 Crores. The net worth of Scal as on March 31, 2013 and March 31, 2014 did not improve, on the other hand, it was approximately Rs. 14 crores (negative) and Rs. 42 crores (negative) respectively when BDMCL, entered into nine (9) additional MoUs with Scal, last of such MoUs being entered on March 27, 2014 whereby Scal was cumulatively expected to make a payment of Rs. 2,290 crores over several years. The net worth or shareholders' funds of Scal (Share Capital + Reserves and Surplus) as observed from the Annual Reports of Scal during the IP is as under:

Table no. 12

As on	Net Worth (Rs. in crores)
March 31, 2012	(3.15)
March 31, 2013	(13.62)
March 31, 2014	(42.48)

March 31, 2015	(94.60)
March 31, 2016	(173.84)
March 31, 2017	(237.70)
March 31, 2018	(319.79)
March 31, 2019	3.51

37. I also note from the MoUs dated March 30, 2012 pertaining to One ICC and Two ICC, Scal was required to pay booking amount being the earnest money for allotment of flats to BDMCL on or before the execution of the MoUs. In this regard, Scal had paid Rs. 13 Crores and Rs. 10 Crores as booking amount in connection with the purchase of the flats. However, being a negative networth company, Scal did not have sufficient funds to pay for the same. Table no. 13 below shows that in the same financial year i.e. FY 2011-12, Scal received Rs. 8.09 Crores from BDMCL, itself and Rs. 23.73 Crores from Archway. Furthermore, Scal borrowed heavily from various Wadia Group companies either for payment of advances for the flats or for payment of interest on the borrowing for funding the purchase of the flats. For example, till March 31, 2014 and March 31, 2015, Scal had made payment of Rs. 262 crores and Rs. 436 crores respectively to BDMCL towards purchase of flats under various MoUs; for making the aforesaid payments, funds to the tune of Rs. 113 crores and Rs. 266 crores were borrowed from Wadia Group Companies as on March 31, 2014 and March 31, 2015 respectively. As seen from the financial statements of Britannia Industries Limited ("BIL") for FYs 2014-15 and 2015-16 (the same year when refund of Rs. 270.35 crores was made to Scal), loans of Rs. 175 Crores and Rs. 125 Crores respectively were advanced by BIL to Scal based on a comfort letter from BDMCL. I also note that as on March 31, 2017, Scal was having outstanding borrowing from HDFC Limited, Archway and Pentafil for Rs. 169.98 crores, Rs. 216.55 crores and Rs. 18 crores respectively. However, during FY 2017-18, all the aforesaid borrowings were repaid by availing Term Loan from DHFL, on the basis of a letter of comfort issued by BDMCL to DHFL on October 30, 2017 stating that "*BDMCL shall ensure that Scal Services Limited will duly and punctually observe and perform all its obligations under the aforesaid term loan. BDMCL further confirmed to DHFL that till the time the aforesaid Term Loan to Scal Services Limited is not repaid in full, it shall not without DHFL's prior approval, dispose of any part of its shareholding in Scal Services Limited."* Therefore, based on the above discussion, I find that the

refund of Rs. 270.35 Crores to Scal on the pretext of slowdown in the real estate sector and litigations on the projects was merely an eye-wash.

Table no. 13 – External and Internal Sources of Funds of Scal

S. No.	Entity	2010-11	2011-12	2012-13	2013-14	2014-15	2015-16	2016-17	2017-18
External Sources of funds (Rs. in crores)									
1	DHFL	-	-	-	-	-	-	-	534.80
2	Tata Capital Financial Services Ltd	-	-	-	62.50	37.50	54.17	-	-
3	HDFC Ltd	-	-	125	100	200	166.66	169.98	-
4	Sicom Ltd	20	-	-	-	-	-	-	-
5	PH Financial & Investment Consultant Pvt. Ltd	5	-	-	-	-	-	-	-
(a)	**Total of External Sources of funds**	**25**	**-**	**125**	**162.50**	**237.50**	**220.83**	**169.98**	**534.80**
Internal Sources of funds (Rs. in crores)									
6	Bombay Dyeing & Manufacturing Co. Ltd.	-	8.09	-	-	-	-	-	-
7	Archway Investment Co. Limited	0.23	23.73	50.60	23.10	31.05	-	216.55	-
8	Britannia Industries Limited	-	-	-	50.00	175.00	125	-	-
9	Britannia Dairy Pvt. Ltd.	-	-	-	25.00	25.00	25	-	-
10	Bombay Dyeing Real Estate Co. Ltd.	-	-	-	6.60	34.60	-	-	-
11	National Peroxide Limited	5	-	-	9.00	-	-	-	-
12	Pentafil Textile Dealers Limited	-	-	-	-	-	-	18	-
(b)	**Total of Internal Sources**	**5.23**	**31.82**	**50.60**	**113.70**	**265.65**	**150**	**234.55**	**-**
(c)=(a)+(b)	**Grand Total**	**30.23**	**31.82**	**175.60**	**276.20**	**503.15**	**370.83**	**404.53**	**534.80**
(d)	**Advance given by Scal to BDMCL towards flats buying**		**25**	**113.40**	**231.46**	**411.21**	**186.27**	**223.65**	**186.12**

38. I also note from the annual reports of Scal that since 2011-12, its registered office was situated at Neville House, J. N. Heredia Marg, Ballard Estate, Mumbai- 400 001. The registered office of Scal was changed with effect from July 30, 2018. As submitted by BDMCL vide email dated May 21, 2021, BDMCL is the registered owner of Neville House. It is noted from the statement recorded on January 21, 2021

(***Annexure-6 to the SCN***), of Mr. N H Datanwala, Director of Scal, that Scal was allowed to use the premises at Neville House without any ownership, rent/lease agreement. During the IP, Scal did not pay any kind of rent or lease charges to BDMCL for having its registered office in Neville House.

39. In view of the aforesaid observations from paragraph 19 to 38 of this order, I find that that BDMCL, along with Scal, executed a scheme to record non-genuine sales made to Scal to the tune of Rs. 2,492.94 crores and profits to the tune of Rs. 1,302.20 crores during FY 2011-12 to FY 2017-18 by entering into MoUs with Scal. During the said period, the entire shareholding of Scal was structured in a manner to camouflage the actual shareholding of BDMCL in Scal. The entire shareholding in Scal was held by BDMCL through various other investment companies of Wadia Group, and therefore, BDMCL was indeed exercising significant influence over Scal directly/ indirectly.

Consolidation of Financial Statements by BDMCL

40. The SCN states that Accounting Standard 23 (Accounting for Investment in Associates in Consolidated Financial Statements) (hereinafter referred to as "AS-23") sets out principles and procedures for recognizing, in the consolidated financial statements, the effects of the investments in associates on the financial position and operating results of a group. AS-23 requires that investment in an associate should be accounted for in consolidated financial statements under the Equity Method wherein unrealized profits and losses resulting from transactions between investor and the associate should be eliminated to the extent of the investor's interest in the associate. Unless specifically established, for categorizing an entity as an associate, the main entity should hold 20% or more shareholding of the first mentioned entity. The SCN has alleged that before the sale of 30% stake in Scal, BDMCL held 49% in Scal and categorized Scal as an "Associate" and that by bringing down shareholding in Scal to 19%, BDMCL did not categorize Scal as an associate company and ensured that the transactions for recognizing revenue as well as the profit on the basis of MoUs to be entered into with Scal need not be consolidated which, if done, would nullify the entire modus operandi followed by BDMCL for artificial inflation of sales and profits.

41. I note that AS-23 requires that investment in an associate should be accounted for in the consolidated financial statements under the Equity Method wherein *unrealized profits and losses resulting from transactions between investor and the associate should be eliminated to the extent of the investor's interest in the associate*. As per AS – 23, unless specifically established, for categorizing an entity as an associate, the main entity should hold 20% or more shareholding of the first mentioned entity. The compliance with AS - 23 is mandatory if an enterprise presents consolidated financial statements, and therefore, it is binding for such an enterprise to account for investments in associates in the consolidated financial statements.

42. In this regard, the Noticees have submitted that Clause 41 of the then Listing Agreement read with Accounting Standard – 21 (Consolidated Financial Statements) required a company to provide consolidated financial results only if the company had subsidiaries. The Noticees have submitted that Scal was not a subsidiary of BDMCL at the relevant time. Furthermore, compliance with AS – 23 is mandatory only if a company prepares consolidated financial statements. As during the FYs 2011-12 to 2013 – 14, BDMCL did not have any subsidiaries, there was no requirement for preparing consolidated financial statements, and as a result recognition of the effects of the investment in Scal as an associate in the consolidated financial statements did not arise. The Noticees have also stated that at the time of decision making they have relied on Opinion dated May 20, 2015 of Manohar Chowdhry & Associates wherein it was stated that BDMCL holds less than 20 % of the total share capital in SCAL, thus, the requirement to treat Scal as an associate based on the investment criteria is not fulfilled in terms of the first limb of the definition of "associate company" under AS – 23. It was also stated therein that Scal does not qualify as an associate of BDMCL under the second limb of the definition of "associate company" i.e. whether the investor exercises control over business decisions of the investee. The Noticees in their replies have also submitted that even as per the Companies Act, 2013, an associate relationship can be established by way of ownership of at least 20% of the total share capital which is not applicable to BDMCL and Scal, as BDMCL throughout the IP had held less than 20% of the total share capital in Scal. The Noticees have also submitted that BDMCL had no power or control on the business decisions taken by the Board of Scal. The Noticees have stated that there was no

provision under any contract or Articles of Association that empowered BDMCL to control the composition of the Board of Directors of Scal.

43. I note that Section 212 of the erstwhile Companies Act, 1956 required a holding company to attach to its balance sheet *inter alia* a copy of the balance sheet of its subsidiary. However, consolidation of financial statements was not mandatory under the erstwhile Companies Act, 1956. On the other hand, under Clause 41(I)(e)(ii) of the erstwhile Listing Agreement, a company having subsidiaries while submitting its annual audited financial results prepared on stand-alone basis was also required to submit annual audited consolidated financial results. Clause 50 of the Listing Agreement required that a company will mandatorily comply with all the Accounting Standards issued by the ICAI from time to time. Therefore, I note from the above reading of 41(I)(e)(ii) read with Clause 50 of the Erstwhile Listing Agreement, BDMCL would have been required to prepare consolidated financial statements for the FY 2011-12 to FY 2013-14, had they held 50% or more shareholding in Scal or any other company. I also note that, AS-23, which stipulates criteria for accounting for investment in Associates, would have been applicable to BDMCL, only if the company had prepared consolidated financial statements. However, I find that, during the financial years 2011-12, 2013-14 and 2013 – 14, BDMCL did not have any subsidiary company. Therefore, BDMCL was not required to prepare consolidated financial statements for the financial years 2011-12, 2012 - 13 and 2013 – 14. However, I note that in FY 2014 – 15, BDMCL disclosed Archway as a subsidiary company, and consequently, in compliance with mandate under Clause 41(I)(e)(ii) and Clause 50 of the Erstwhile Listing Agreement, and by virtue of the mandate under the then newly enacted Section 129 (3) of the Companies Act, 2013, BDMCL started preparing and presenting the consolidated financial statements from FY 2014-15. I note that the financials of Scal were yet not consolidated with the financials of BDMCL as according to BDMCL, as it held only 19% shareholding in Scal, and therefore, did not recognise it as an “associate company” as the definition of “associate company” under the Companies Act, 2013 means a company in which the other company exercises significant influence i.e. control of at least 20% of the total share capital or of business decision under an agreement. However, I note that section 129 (1) of the Companies Act, 2013 read with Clause 50 of the Erstwhile Listing

Agreement and Regulation 48 of SEBI (LODR) Regulations, 2015[4] require that a company shall comply with all the applicable Accounting Standards. As a result, and by virtue of the mandate of AS-23, irrespective of the fact that BDMCL was not holding the requisite 20% shareholding in Scal, **in view of the following reasons,** BDMCL ought to have disclosed Scal as an "associate company" from FY 2014 - 15 and consolidated the financials of Scal with itself:

(a) An "associate" is defined under the AS- 23 as "*an enterprise in which the investor has significant influence and which is neither a subsidiary nor a joint venture of the investor*." Clause 4 of the AS – 23 states that "significant influence" may be gained by share ownership of 20% or more of voting power either directly or indirectly through subsidiary companies. If the investor holds directly or indirectly through subsidiary(ies), less than 20% of the voting power of the investee, it is presumed that the investor does not have significant influence, *unless such influence can be clearly demonstrated*. In this regard, I note that Paragraph 5 of AS – 23 states that existence of significant influence by an investor is usually evidenced *inter alia* through (i) material transactions between the investor and the investee and (ii) representation on the board of directors. I shall now examine whether the two conditions are met in the instance case.

(i) Material transactions between the investor and the investee

(b) I note that from FY 2011-12 to FY 2017-18, total revenue of BDMCL for real estate segment was Rs. 4,429.57 crores out of which revenue based on MoU with Scal was recorded at Rs. 2,492.94 crores which meant that during FY 2011-12 to FY 2017-18, BDMCL recognized around 56% of real estate revenue based on sales made to Scal. In fact, during FY 2013-14, BDMCL recognised 83% of its revenue from Scal. Furthermore, the operating profit for the real estate segment of

[4] From December 1, 2015, SEBI (LODR) Regulations, 2015 came into force, replacing the Erstwhile Listing Agreement. Thus, from the FY 2015-16, SEBI (LODR) Regulations, 2015, became applicable to BDMCL. Regulation 33(3)(b) and 33(3)(d) of SEBI (LODR) Regulations, 2015 was analogous to Clause 41(1)(e) of the Erstwhile Listing Agreement and Regulation 48 of SEBI (LODR) Regulations, 2015 was analogous to Clause 50 of the Erstwhile Listing Agreement.

BDMCL is Rs. 2317.54 Crores of which profit before tax on sales made to Scal under the MoUs is Rs. 1302.20 Crores[5].

(c) I also note that the Chartered Accountant Firm's Opinion, wherein it has been stated that Scal cannot be termed as an associate of BDMCL and which has been relied on by the Noticees to show that they have considered expert opinions as members of Audit Committee, have categorically stated that the opinion given by them is based on the facts and information given to them by BDMCL and that the inaccuracy or incompleteness could have a material impact on the conclusions. I note from page 2 of the Opinion that BDMCL had submitted to Chartered Accountant firm that "*the transactions between BDMCL and Scal are neither material nor significant during FY 2014 -15*". However, I find that BDMCL did not disclose to the Chartered Accountant firm that based on the MoU entered with Scal, it had recognized revenue of Rs. 301.11 Crores for FY 2014 -15 i.e. the financial year for which the Opinion was provided, which accounted for 68% of the revenue recognized.

(d) Based on the above, I find that BDMCL had material transactions with Scal from FY 2011-12 to FY 2017-18, and by virtue of the same, BDMCL exercised significant influence over Scal.

(ii) Representation on the board of directors

(e) I note that the term "representation" is not defined in the AS – 23. The Black's Law Dictionary defines "representation"[6] as "*an act or instance of standing for or acting on behalf on another*". I note that from the disclosures made by the Scal in its Annual Reports, from FY 2011-12 to 2018-19, the following were the members of Board of Directors during the Investigation Period:

Table No. 14

S. No.	Name of the Director	Begin Date	End Date
1	Mr. D S Gagrat	Before IP	Not Applicable
2	Mr. R V Sarma	Before IP	March 30, 2012
3	Mr. J C Bham	Before IP	March 30, 2012
4	Mr. S Raja	Before IP	March 30, 2012

[5] Profit made on sales to Scal does not include data of FY 2011-12 as the same is not available in the annual report for FY 2011-12.
[6] At page no 1415.

5	Mr. R Chandrasekharan	March 30, 2012	December 08, 2014
6	Mr. N H Datanwala	March 30, 2012	Not Applicable
7	Mr. Shailesh Karnik	August 04, 2015	August 2020

(f) I note from the Investigation Report that Mr. D S Gagrat, Mr. R Chandrasekharan, Mr. N H Datanwala and Mr. Shailesh Karnik were also directors in other Wadia group companies. The following Table provides details of the same:

Table No. 15

Name of Director	**Directorship in Wadia Group companies**	**Other Relationship with BDMCL/ Wadia group**
Mr. D S Gagrat	Scal, Oseaspre Consultants Limited, Springflower, Archway, Pentafil, Nessville Trading Private Limited, Neville Wadia Private Limited	-
Mr. R Chandrasekharan	Scal, BDRECL, Sunflower Investment and Textiles Limited (Promoter of BDMCL), Archway, N W Exports Limited, Nowrosjee Wadia and Sons Limited, Pentafil, Wadia Investments Limited, BDS Urban Infrastructure Private Limited, Wadia Techno-Engineering Services Limited	Vice President of BDMCL during FY 2009-10 and FY 2010-11[7]
Mr. N H Datanwala	Scal, Springflower, Neville Wadia Private Limited, Havenkores Real Estate Private Limited,	CFO of Bombay Burmah Trading Company Limited
Mr. Shailesh Karnik	Scal, Archway, Pentafil, Wadia Techno- Engineering Services Limited, Bombay Dyeing Real Estate Company Limited	Director in a number of Wadia Group Companies, however, drawing remuneration only from Nowrosjee Wadia and Sons Limited

(g) I note from Annexure 6 to the SCN i.e. Copy of statement of Mr. NH Datanwala recorded on January 21, 2021 that none of the directors of Scal were paid any remuneration. Furthermore, he has submitted that he is employed with Bombay Burmah Trading Corporation Limited since 1998 and is currently the Chief Financial Officer of the company drawing a salary of Rs. 84 Lakhs per annum.

[7] Annual Report of BDMCL for FY 2009-10 and 2010-11.

Apart from this, he also receives sitting fees from Macrofil Investments Limited, another Wadia Group company, at the rate of Rs. 3,000/- per meeting. Similarly, Mr. Shailesh Karnik has been drawing remuneration from Nowrosjee Wadia and Sons Limited. I find that directors of Scal did not receive any remuneration from the company, nor did they ask for the same. One of the most important roles of a director is to exercise his independent judgment. It is difficult to believe that the directors of Scal who were not drawing remuneration from Scal but from other Wadia Group companies would exercise independent judgment in the interest of Scal. This is further corroborated by the fact that the Board of Directors in their meeting held on December 21, 2012 agreed that the sale of the flats held by Scal be executed by BDMCL. Therefore, I find that BDMCL was exercising significant influence over Scal.

(h) I find that by virtue of having material transactions with Scal and by having representation on the board of directors of Scal, BDMCL ought to have treated Scal as an "associate" company and consolidated Scal's financials in terms of AS-23 read with Section 129 (1) of the Companies Act, 2013 from FY 2014 – 15 till FY 2016 – 17, which it has failed to do.

44. From FY 2017 -18, the Indian Accounting Standards (hereinafter referred to as "Ind AS") issued under the Companies (Indian Accounting Standards) Rules, 2015 were applicable to BDMCL. I note that similar stipulations are prescribed in Indian Accounting Standard - 28 titled "Investments in Associates and Joint Ventures" for the definition of 'an associate' and explanation of 'significant influence'. Thus, I find that, Scal ought to have been recognized as 'an associate' of BDMCL for the purposes of IndAS 28, as well, and consequently the financial statements of BDMCL ought to have been prepared as per IndAS 28 for the FY 2017-18, which it has failed to do.

45. From the aforesaid analysis, I note that until FY 2013-14, BDMCL did not recognize any company as its subsidiary, hence, it was not mandated to prepare consolidated financial statements, and as a result, AS-23 was also not applicable which would have mandated the consolidation of financials of Scal with BDMCL. However, from 2014-15, and by virtue of the mandate under section 129 (3) of the Companies Act, 2013, and on account of the fact that for FY 2014 – 15 and 2015 – 16, BDMCL disclosed

Archway as a “subsidiary company”, it started preparing consolidated financial statements. I find that BDMCL did not comply with the mandate in AS-23, on the pretext that Scal was not ‘an associate’ in terms of Section 2(6) of Companies Act, 2013. However, I find that Scal was an ‘associate’ for the purposes of Companies Act, 2013, in terms of AS-23/ IndAS 28 and BDMCL was required to comply with AS-23/ IndAS 28, by virtue of the mandate under Section 129(1) of the Companies Act, 2013, Clause 50 of the Erstwhile Listing Agreement and Regulation 48 of SEBI (LODR) Regulations, 2015, and therefore, liable for accounting the sales made to Scal and the revenue generated therefrom to the extent of the BDMCL’s interest in Scal.

46. I also note that despite Scal being ‘an associate’ in terms of AS-23/ IndAS28, and despite AS-23 and IndAS 28 being made applicable to BDMCL from FY 2014-15, BDMCL failed to comply with the stipulations under these Accounting Standards, which would have mandated it to record the investments of BDMCL in Scal under the Equity Method (which would have eliminated the recording of sales of BDMCL to Scal).

Whether Scal was a related party of BDMCL:

47. I note that during the financial years 2012 - 13 and 2013 -14 i.e. even in the financial years when BDMCL was holding 19% of the shareholding of Scal, BDMCL has indeed shown Scal as an associate company for the purpose of “related party disclosures”. In this regard, the Noticees have submitted that during the financial years 2012-13 and 2013 -14, BDMCL did not own, directly or indirectly, 20% or more of the voting power in Scal, however, Scal was shown as an associate company purely out of abundant caution, as a consequence of ambiguities in the interpretation of the term. The Noticees have also submitted that after the Companies Act, 2013 came into force, there was no ambiguity that Scal would not be an associate company. Therefore, from FY 2014-15 onward, Scal was referred to as a “group company” for lack of a “better phrase”. The Noticees have referred to the definition of “related party” under AS -18 and Ind AS - 24, the Noticees have also relied on the definitions of “control”, “associates” and “joint ventures” under AS -18 and Paragraph 3 of AS – 18 to state that BDMCL and Scal were not related parties for the following reasons:

(a) *During the financial year 2011 – 12 (from 29 March 2012 onwards) BDMCL held 19% of the equity share capital of Scal. BDMCL did not have a majority stake in or exercise control over any of the other companies that held shares in Scal.*
(b) *BDMCL did not at any point in time have the power to control the composition of the Board of Directors of Scal.*
(c) *The directors of Scal were appointed without reference to or the approval of BDMCL and the directors of SCAL took their decisions independently, without any reference or recourse to BDMCL.*
(d) *BDMCL did not nominate any director on the Board of Scal, nor did such directors act under the directions of BDMCL.*
(e) *BDMCL had no say at the Board Meetings of Scal.*
(f) *None of the directors of entire Scal or BDMCL was a director or held along with his relatives more than 2% of the paid up share capital of the other company.*
(g) *The Board of Directors or Managing Director of BDMCL or Scal cannot be said to have been accustomed to act in accordance with the advice, directions or instructions of the other company or any director of the other company.*
(h) *BDMCL was not, at the relevant time, in a position to control or exert significant influence over Scal (in the absence of control over the latter's business decisions) and was not the parent or holding company of Scal. Neither was Scal an associate company of BDMCL; nor was it at any time a joint venture of BDMCL; nor even were the two themselves joint venture of BDMCL; nor even were the two themselves joint ventures of any third company. In any event, Ind AS – 24 came into force from 1 April 2017, and as such could only be applied from the financial years 2017 -18.*

48. Having noted the above, I note that for the FY 2014-15, the stipulations of related party disclosures were contained in the Erstwhile Listing Agreement (as amended from April 17, 2014) and for the financial years 2015-16 to 2017-18, SEBI (LODR) Regulations, 2015, became applicable from December 1, 2015. As per Clause 49 (VII) B of the Erstwhile Listing Agreement (as amended from April 17, 2014), a 'related party' is "*a person or entity that is related to the company. Parties are considered to be related if one party has the ability **to control the other party or exercise significant influence over the other party, directly or indirectly in making financial and/or operating decisions***". I note that Regulation 2(zb) of SEBI (LODR) Regulations, 2015 (which became applicable w.e.f. December 1, 2015), defines related party to mean related party as defined in section 2 (76) of the Companies Act, 2013 or as defined in the applicable Accounting Standards. For the period from FY 2014 -15 to FY 2016-17, Accounting Standard – 18 was the relevant Accounting Standard. In this regard, I note that Paragraph 3 of the AS – 18 states that the Standard deals only with the related party relationships *inter alia* with associates of the reporting enterprise. I note that AS

– 18 defines "an associate" as an enterprise in which an investing reporting party has significant influence and which is neither a subsidiary nor a joint venture of that party. Furthermore, "significant influence" is defined therein as "***participation in the*** *financial and/or* ***operating policy decisions of an enterprise****, but not control of those policies*". I note from the minutes of Meeting of the Board of Directors of Scal held on December 21, 2012, that the Board of Directors of Scal was informed that BDMCL had approached Scal with an offer to negotiate and sell the flats held by Scal. In this regard, the Minutes record that the Board of Directors of Scal was of the opinion that Scal ***did not have the requisite experience and manpower to sell the flats held by it at the optimum value and it would be in the Company's interest to avail the offer of BDMCL in selling the flats owned by Scal***. The Board of Directors agreed that the sale of the flats held by Scal shall be executed by BDMCL provided that BDMCL pays Scal the entire profits of the sale proceeds received from the buyer's net of selling expenses and brokerage. From the minutes of Board Meeting of Scal dated March 25, 2014, August 05, 2014, August 28, 2015, September 02, 2016, June 20, 2017, September 01, 2017, October 05, 2017, December 29, 2017, I note that flats held by Scal were sold by BDMCL to the third parties on behalf of Scal. In this regard, I note that in terms of Clause 45 of the Memorandum of Association of Scal, one of the Objects of the company was "*to buy, sell, improve, develop and manage all kinds of property movable and immovable and of all kinds of business concerns and undertaking*." I find it difficult to believe that the Board of Directors of a company whose object is to buy and sell immovable property would state that they did not have the requisite experience and manpower to sell the flats held by it at the optimum value especially when they had entered into five (5) MoUs dated March 30, 2012 (2), June 30, 2012 (2) and September 27, 2012 with BDMCL for purchasing and selling 114 flats for the consideration of Rs. 932 Crores. This shows that BDMCL was participating in the operating policy decisions of Scal.

49. Interestingly, despite admitting that the company did not have the requisite expertise and manpower to sell the flats purchased by it under the MoUs entered with BDMCL, the Board of Directors of Scal, in the same meeting held on December 21, 2012 resolved to purchase 10 more apartments in the residential building "One ICC" with BDMCL for a total consideration of Rs. 91.29 Crores. Accordingly, MoU dated

December 31, 2012 was entered into between Scal and BDMCL whereby 10 more flats were sold to Scal on the understanding that Scal may further sell the flats to any purchaser.

50. Further, I note from Annexure 6 to the SCN i.e. Copy of statement of Mr. NH Datanwala recorded on January 21, 2021 that none of the directors of Scal were paid any remuneration. As noted earlier in this order, the directors of Scal namely, Mr. D S Gagrat, Mr. R Chandrasekharan, Mr. N H Datanwala and Mr. Shailesh Karnik were also directors in other Wadia group companies including the shareholders of Scal and associates of BDMCL like Archway, Pentafil and BDRECL.

51. Furthermore, I note that the Board of Directors of Scal agreed to the offer of BDMCL allowing BDMCL to sell flats held by it on the condition that BDMCL paid Scal the entire profits of the sale proceeds received from the buyers' net of selling expenses and brokerage. A prudent director is expected to exercise reasonable care and skill while discharging his functions. I note that for the directors of Scal to engage BDMCL to sell flats owned by it and to fetch a profit for Scal especially when the said flats had already been sold to Scal and revenue had been booked by BDMCL in connection with the same, shows that BDMCL was participating in its operation policy decisions and the said arrangement was not a pure commercial transaction.

52. It is pertinent to note the opinion on whether Scal is a related party of BDMCL in terms of AS – 18 – Related Party Transactions dated May 24, 2016 provided by Mr. N. D. Gupta and submitted by the Noticees. The Opinion notes on the basis on the terms and conditions of the MoU *inter alia* as under:

(a) Subsequent to the execution of MoU, all risks and rewards attached to the said apartments shall be of Scal and any surplus/ profit or deficit/ loss earned or incurred on further sale of such apartments shall entirely belong to and due to Scal only.

(b) ***Scal is free to sell the apartments to any party identified by it at such terms and conditions as approved by its Board of Directors.***

(c) ***There is no restriction on Scal to take approvals from the Querist in carrying out business activities and it is free to carry out its business in terms of policies determined by its Board of Directors.***

(d) *There is no restriction or prohibition on Scal from dealing in any transactions of buying and selling of properties from any person other than the Querist.*
(e) ***The transaction between Scal & the Querist is restricted only to the purchase and sale of apartments as per MoU at agreed price.***
(f) *The approval of the Querist for sale of properties to new purchasers identified by Scal is a general industry practice which is also subject to the condition that such approval will not be unreasonably withheld by the Querist. We are made to understand that as on the date of the opinion, the Querist has given approval to all new purchasers identified by Scal within reasonable time.*
(g) *Based on the facts given above read with AOA of Scal, it is inferred that Scal is free to carry out its business transactions without any intervention or influence of the Querist of whatsoever nature and as such, the Querist does not have any power to participate in the operating and / or financial policy of Scal.*

I note that on page 14 of the Opinion provided by Mr. N D Gupta, it has been stated that the opinion has been given on the basis of the information and documents made available to them by the management of the Querist i.e. BDMCL. I note that the BDMCL did not disclose to Mr. N D Gupta the fact that it had made an offer to Scal to sell the flats held by it and the same had been accepted by Scal and accordingly, BDMCL had sold flats on behalf of Scal.

53. I also note that paragraph 13 of the AS – 18 states that "significant influence" may be exercised in several ways including material inter-company transactions. As AS – 18 defines "associate" as an enterprise wherein the investing reporting party has significant influence, the Opinion dated May 24, 2016 provided by Mr. N. D. Gupta relies on paragraph 4 of AS -18 to state that although the transaction between BDMCL and Scal may be a material transaction, however, paragraph 4 of AS -18 specifically excludes significant transactions on unilateral basis from the purview of related party transactions, and on account of the same, Scal is not an associate of BDMCL. In this regard, I find it pertinent to reproduce paragraph 4 of AS -18 which is as under:

*"4. In the context of this Standard, **<u>the following are deemed not to be related parties</u>**:*

(a) *two companies simply because they have a director in common, notwithstanding paragraph 3(d) or (e) above (unless the director is able to affect the policies of both companies in their mutual dealings);*
(b) ***<u>a single customer, supplier, franchiser, distributor, or general agent with whom an enterprise transacts a significant volume of business merely by virtue of the resulting economic dependence; and</u>***

(c) the parties listed below, in the course of their normal dealings with an enterprise by virtue only of those dealings (although they may circumscribe the freedom of action of the enterprise or participate in its decision-making process):
(i) providers of finance;
(ii) trade unions;
(iii) public utilities;
(iv)government departments and government agencies including government sponsored bodies."

54. I note that as per paragraph 4 of AS – 18, an entity with whom the enterprise a significant volume of business ***merely by virtue of such economic dependence*** may not be considered as a "related party". In common parlance the term "merely" is understood to mean "only" or "simply" to emphasize a fact. Therefore, an entity may not be considered as a related party merely because of the economic dependence created as a result of the significant volume of business between the enterprise and such entity. I note that from FY 2011-12 to FY 2017-18, total revenue of BDMCL for real estate segment was Rs. 4,429.57 crores out of which revenue based on MoU with Scal was recorded at Rs. 2,492.94 crores which meant that during FY 2011-12 to FY 2017-18, BDMCL recognized around 56% of real estate revenue based on sales made to Scal. In fact, during FY 2013-14, BDMCL recognised 83% of its revenue from Scal. Furthermore, the operating profit for the real estate segment of BDMCL is Rs. 2317.54 Crores of which profit before tax on sales made to Scal under the MoUs is Rs. 1302.20 Crores[8]. In addition to the significant volume of business between BDMCL and Scal, BDMCL also held 19% of the shareholding of Scal while the remaining shareholding was held by other Wadia Group companies. From Tables 3 to 6, I find that BDMCL directly/indirectly held the entire share capital of Scal. I also note that Scal's office was located in Neville House, J. N. Heredia Marg, Ballard Estate, Mumbai – 400 001 which is owned by BDMCL, and Scal did not pay any rent to BDMCL for using the same as office premises. I note that the aforesaid facts were overlooked by Mr. N. D. Gupta while stating that BDMCL and Scal were not related parties. Therefore, I find that BDMCL had material transactions with Scal, and by

[8] Profit made on sales to Scal does not include data of FY 2011-12 as the same is not available in the annual report for FY 2011-12.

virtue of the same, BDMCL exercised significant influence over Scal for the purpose of AS – 18.

55. In view of the above, I find that BDMCL was exercising significant influence over Scal and therefore, BDMCL ought to have shown Scal as an "related party" for FY 2014 -15 in terms of the Erstwhile Listing Agreement (as amended from April 17, 2014) and from FY 2015- 16 to FY 2016- 17 in terms of SEBI (LODR) Regulations, 2015 read with Clause 50 of the Erstwhile Listing Agreement and Regulation 48 of SEBI (LODR) Regulations, 2015, which it failed to do.

56. The Noticees have submitted that BDMCL and Scal were not related parties under the Companies Act, 2013 for the following reasons:

   (a) Scal and BDMCL were both public companies and none of the directors of either of these companies was a director or held along with his relatives more than 2% of the paid – up share capital of the other company;
   (b) Neither the Boards of Directors, nor the Managing Directors of BDMCL and Scal were accustomed to act in accordance with the advice, directions or instructions of the other company or any director of the other company. The directors of Scal were self-sustained, with decades of experience in their own right. There is nothing to show that they acted under the control of BDMCL;
   (c) There was no holding – subsidiary company relationship between BDMCL and Scal.

57. I note that section 2 (76) of the Companies Act, 2013 defines "related party" to *inter alia* includes any person on whose advice, directions or instructions a director or manager is accustomed to act. it is pertinent to note the observations of the Hon'ble Supreme Court in *Phoenix ARC Private Limited* v. *Spade Financial Services Limited and others*[9] albeit in the context of "related parties" defined under the Insolvency and Bankruptcy Code, 2016 wherein the parties involved were held to be related parties on account of the deep entanglements between the parties. Furthermore, the argument that the transactions between the parties were purely commercial was rejected on account of the extensive history demonstrating interrelationship between the individuals associated with the corporations and the fact that the company undertook

[9] AIR 2021 SC 776.

them due to the pervasive influence of the person on whose advice the company was accustomed to act.

58. In this regard, as noted above from the minutes of Board Meeting of Scal dated December 21, 2012, that the Board of Directors of Scal was of the opinion that Scal did not have the requisite experience and manpower to sell the flats held by it at the optimum value and therefore, availed the offer of BDMCL to sell the flats owned by Scal. Even at the cost of repetition, I note that the Board of Directors of Scal agreed to the offer of BDMCL allowing BDMCL to sell the flats owned by Scal on the condition that BDMCL paid Scal the entire profits of the sale proceeds received from the buyers' net of selling expenses and brokerage. I note that prior to the enactment of the Companies Act, 2013, the duties of the directors were not specified under the Companies Act, 1956. The duties of the directors included the duty to use fair and reasonable diligence while discharging their duties and to act in a fiduciary capacity. A prudent director is expected to exercise reasonable care and skill while discharging his functions. I note that for the directors of Scal to engage BDMCL to sell flats owned by it and to fetch a profit for Scal especially when the said flats had already been sold to Scal and revenue had been booked by BDMCL in connection with the same, shows that the said arrangement was not a pure commercial transaction and was done at the behest of BDMCL which was exercising influence over Scal and participating in its operation policy decisions. Furthermore, during the said period BDMCL held 19% of the shareholding of Scal while the remaining shareholding was held by other Wadia Group companies. I also note that the directors of Scal namely, Mr. D S Gagrat, Mr. R Chandrasekharan, Mr. N H Datanwala and Mr. Shailesh Karnik were also directors in other Wadia group companies including the shareholders of Scal and associates of BDMCL like Archway, Pentafil and BDRECL. Furthermore, I note from Annexure 6 to the SCN i.e. Copy of statement of Mr. NH Datanwala recorded on January 21, 2021 that none of the directors of Scal were paid any remuneration. He has also submitted that he is employed with Bombay Burmah Trading Corporation Limited since 1998 and is currently the Chief Financial Officer of the company drawing a salary of Rs. 84 Lakhs per annum. Apart from this, he also receives sitting fees from Macrofil Investments Limited, another Wadia Group company, at the rate of Rs. 3,000/- per meeting. Similarly, Mr. Shailesh Karnik has been drawing remuneration from

Nowrosjee Wadia and Sons Limited. In this regard, it is pertinent to note the observations of the Hon'ble Supreme Court in *Phoenix ARC Private Limited* v. *Spade Financial Services Limited and others*[10] wherein the parties involved were held to be related parties on account of the deep entanglements between the parties. Furthermore, the argument that the transactions between the parties were purely commercial was rejected on account of the extensive history demonstrating interrelationship between the individuals associated with the corporations and the fact that the company undertook them due to the pervasive influence of the person on whose advice the company was accustomed to act.

59. I note that from the FY 2017-18, IndAS became applicable to BDMCL. Thus, I shall now examine whether Scal was a 'related party' in accordance with Indian Accounting Standard (Ind AS) 24 titled "Related Party Disclosures". I note that Para 9(b)(ii) of IndAS 24 identifies an entity being related to a reporting entity if one entity is an associate of another entity. I note that the term 'associate' is not defined in IndAS 24, however, Regulation 2(1)(b) of SEBI (LODR) Regulations, 2015 draws the definition of 'associate' from Section 2(6) of Companies Act, 2013. As held in the earlier paragraphs of this order, BDMCL held only 19% in the share capital of Scal, and therefore, it did not fall under the definition of 'associate' in terms of Section 2(6) of Companies Act, 2013. I, thus, find that Scal was not a 'related party' in accordance with IndAS 24 for the FY 2017- 18.

60. In view of the above discussion from paragraph nos. to 47 to 58, I find that for FY 2014 -15 to FY 2016 -17, BDMCL and Scal were "related parties" for the purpose of the Companies Act, 2013 and the LODR Regulations, 2015 which in turn defines "related party" as defined under the Companies Act and the applicable Accounting Standards.

61. I note that in the absence of related party disclosures, there is a general presumption that transactions reflected in the financial statements have been entered into on an arm's length basis between independent parties. However, that presumption may not

[10] *Supra* note 9.

be valid when related party relationships exist because related parties may enter into transactions which unrelated parties would not enter into. Also, transactions between related parties would be effected on terms and conditions different from unrelated parties. Therefore, disclosures pertaining to related parties are one of the pillars of fair and true financial statements. I note that for the financial years 2012 -13 and 2013 -14, BDMCL has shown Scal as an associate company for the purpose of related party disclosures in its Annual Reports. From FY 2014-15 onward, Scal was referred to as a “group company” by BDMCL in its Annual Reports.

62. As noted above, BDMCL and Scal were related parties as noted above in paragraph 60 of this order and ought to have been disclosed as such in the financial statements of BDMCL. Therefore, I find that despite being related parties, as shown above, BDMCL failed to comply with the Erstwhile Listing Agreement (as amended from April 17, 2014) and the SEBI (LODR) Regulations, 2015 and the Companies Act, 2013.

63. The Noticees have argued that there is no legal requirement of considering ownership by a company after eliminating cross holdings amongst various group companies for determining control by such company. The Noticees’ have stated that under the Companies Act as well as the Accounting Standards, control has to be established by the ownership, directly or indirectly through the subsidiaries of more than one half of the voting power of an enterprise. Having noted the submissions of the Noticees, I note that as stated earlier the test relied on in this present matter is not that of whether BDMCL had “control” under AS – 23, AS -18 and Erstwhile Listing Agreement, but that of whether BDMCL exercised “significant influence” over Scal which has been established in the foregoing paragraphs. Similarly, under the Companies Act, the test used to determine whether Scal is a related party is that of whether the directors of Scal were accustomed to act on the advice, directions or instructions of BDMCL which has been established in the foregoing paragraphs.

64. I note from Table no. 8 and Table No. 11 that despite Scal having negative net worth of approximately Rs. 3 crores as on March 31, 2012, BDMCL entered into two (2) MoUs dated March 30, 2012 for consideration of Rs. 743 Crores. Furthermore, the

net worth of Scal as on March 31, 2013 and March 31, 2014 was approximately Rs. 14 crores (negative) and Rs. 42 crores (negative) respectively. Despite the same, BDMCL, subsequently, entered into nine (9) additional MoUs with Scal, last of such MoUs being entered on March 27, 2014 whereby Scal was cumulatively expected to make a payment of Rs. 2,290 crores over several years based on the physical stage of construction of Project One ICC and Project Two ICC. The net worth or shareholders' funds of Scal (Share Capital + Reserves and Surplus) as observed from the Annual Reports of Scal during the IP is as under:

Table no. 16

As on	Net Worth (Rs. in crores)
March 31, 2012	(3.15)
March 31, 2013	(13.62)
March 31, 2014	(42.48)
March 31, 2015	(94.60)
March 31, 2016	(173.84)
March 31, 2017	(237.70)
March 31, 2018	(319.79)
March 31, 2019	3.51

65. I also note from the MoUs dated March 30, 2012 pertaining to One ICC and Two ICC that Scal had paid Rs. 13 Crores and Rs. 10 Crores as booking amount being the earnest money for allotment of flats. I note that in the same financial year i.e. FY 2011-12, Scal received Rs. 8.09 Crores from BDMCL, itself and Rs. 23.73 Crores from Archway. I note that Scal used the borrowings received from various Wadia Group companies either for payment of advances for the flats or for payment of interest on the borrowing for funding. For example, till March 31, 2014 and March 31, 2015, Scal had made payment of Rs. 262 crores and Rs. 436 crores respectively to BDMCL towards purchase of flats under various MoUs; for making the aforesaid payments, funds to the tune of Rs. 113 crores and Rs. 266 crores were borrowed from Wadia Group Companies as on March 31, 2014 and March 31, 2015 respectively. As seen from the financial statements of Britannia Industries Limited ("BIL") for FYs 2014-15 and 2015-16, the loan was advanced by BIL to Scal based on comfort letter from BDMCL. I also note that as on March 31, 2017, Scal was having outstanding borrowing from HDFC Limited, Archway and Pentafil for Rs. 169.98 crores, Rs. 216.55 crores and Rs. 18 crores respectively. However, during FY 2017-18, all the aforesaid borrowings were repaid by availing Term Loan from DHFL, on the basis of

a letter of comfort issued by BDMCL to DHFL on October 30, 2017 stating that "*BDMCL shall ensure that Scal Services Limited will duly and punctually observe and perform all its obligations under the aforesaid term loan. BDMCL further confirmed to DHFL that till the time the aforesaid Term Loan to Scal Services Limited is not repaid in full, it shall not without DHFL's prior approval, dispose of any part of its shareholding in Scal Services Limited.*"

66. In view of the above, I find that the payment made by Scal towards the said booking amount was financed through borrowings from various group companies of BDMCL and through external entities such as DHFL based on the intervention of BDMCL.

67. The Noticees have stated that DHFL, as a lender, desired to have a comfort letter from BDMCL, as BDMCL was the developer of the ICC Project. The Noticees have also stated that BDMCL saw no objection in acceding to the same and agreed to give the comfort letter, as a similarly placed lender would seek such comfort from a similarly placed developer. I note from the contents of the Comfort Letter that the same has been provided by BDMCL in its capacity as a shareholder of Scal, and not as a developer of a project in which Scal had purchased flats. I note that by providing a comfort letter whereby BDMCL committed to not dispose of its shareholding in Scal till the loan is repaid indicates that BDMCL was, in fact, in control of and in charge of operations of Scal. I note that it is based on the faith of that letter, DHFL sanctioned the aforesaid term loan to Scal, an entity whose net worth was Rs. 237.70 crores (negative) as on March 31, 2017 and which was making losses since last several years.

68. The aforesaid findings can be summarized as under:

   (a) BDMCL, along with Scal, executed a scheme to record non-genuine sales made to Scal to the tune of Rs. 2,492.94 crores and profits to the tune of Rs. 1,302.20 crores during FY 2011-12 to FY 2017-18 by entering into MoUs with Scal. During the said period, the entire shareholding of Scal was structured in a manner to camouflage the actual shareholding of BDMCL in Scal. By holding its entire shareholding in Scal through various other investment companies of Wadia Group, BDMCL was exercising control over Scal directly/ indirectly.

(b) BDMCL would have been required to prepare consolidated financial statements for the FY 2011-12 to FY 2013-14, if they held 50% or more shareholding in Scal or any other subsidiary in terms of Clause 41(I)(e)(ii) read with Clause 50 of the Erstwhile Listing Agreement. Further, AS-23, which stipulates criteria for accounting for investment in Associates, would have been applicable to BDMCL, only if the company had prepared consolidated financial statements. However, during the financial years 2011-12, 2013-14 and 2013 – 14, BDMCL did not have any subsidiary. Therefore, BDMCL was not required to prepare consolidated financial statements for the financial years 2011-12, 2013-14 and 2013 – 14. However, from 2014-15, and by virtue of the mandate under section 129 (3) of the Companies Act, 2013, and on account of the fact that for FY 2014 – 15 and 2015 – 16, BDMCL disclosed Archway as a "subsidiary company", it started preparing consolidated financial statements, and consequently the mandate to record the investments of BDMCL in Scal as per AS-23, also became applicable. I find that, while Scal was an 'associate' in terms of AS-23/ IndAS 28 and BDMCL was required to comply with AS-23/ IndAS 28, by virtue of the mandate under Section 129(1) of the Companies Act, 2013, Clause 50 of the Erstwhile Listing Agreement and Regulation 48 of SEBI (LODR) Regulations, 2015, and therefore, liable for accounting the sales made to Scal and the revenue generated therefrom to the extent of the BDMCL's interest in Scal. BDMCL failed to comply with the stipulations under these Accounting Standards, which would have mandated it to record the investments of BDMCL in Scal under the Equity Method (which would have eliminated the recording of sales of BDMCL to Scal).

(c) In the absence of related party disclosures, there is a general presumption that transactions reflected in the financial statements have been entered into on an arm's length basis between independent parties. However, that presumption may not be valid when related party relationships exist because related parties may enter into transactions which unrelated parties would not enter into. Scal was referred to as a "group company" by BDMCL in its Annual Reports from FY 2014-15 onwards. I note that for the FY 2014-15, the stipulations of related party disclosures were contained in the Erstwhile Listing Agreement (as amended from April 17, 2014) and for the FY 2015-16 to 2017-18, the SEBI (LODR)

Regulations, 2015, became applicable from December 1, 2015. Based on the analysis in the abovementioned paragraphs, I find that BDMCL was exercising significant influence over Scal and therefore, BDMCL ought to have shown Scal as an "associate" for FY 2014 -15 in terms of the Erstwhile Listing Agreement (as amended from April 17, 2014) and from FY 2015- 16 to FY 2016- 17 in terms of SEBI (LODR) Regulations, 2015, which it failed to do.

(d) I find that Scal did not have any independent office during the Investigation Period and operated from "Neville House, J. N. Heredia Marg, Ballard Estate, Mumbai- 400 001" which was owned by BDMCL without paying any rent/ lease charges. The aforesaid fact shows that BDMCL was in control of Scal. It was only in FY 2018 – 19, that the registered office of Scal was shifted to Raheja Point I, Wing 'A', Pt. Jawaharlal Nehru Road, Vakola, Santacruz (E), Mumbai- 400 055 which is owned by Wadia Techno-Engineering Services Limited, a Wadia Group Company.

(e) The directors of Scal namely, Mr. D S Gagrat, Mr. R Chandrasekharan, Mr. N H Datanwala and Mr. Shailesh Karnik were also directors in other Wadia group companies. Admittedly, none of the directors received any remuneration for their role as directors of Scal.

(f) From the minutes of Board Meeting of Scal wherein it was recorded that the Board of Directors of Scal was of the opinion that Scal did not have the requisite experience and manpower to sell the flats held by it at the optimum value and therefore, availed the offer of BDMCL to sell the flats owned by Scal. A prudent director is expected to exercise reasonable care and skill while discharging his functions. I note that for the directors of Scal allowed BDMCL to sell flats owned by it and to fetch a profit for Scal especially when the said flats had already been sold to Scal and revenue had been booked by BDMCL in connection with the same, only show that the said arrangement was not a pure commercial transaction.

(g) I find that that despite Scal having negative net worth throughout financial years 2011-12, 2012- 13 and 2013 – 14 i.e. Rs. 3 crores, Rs. 14 crores and Rs. 42 crores, BDMCL entered into total 11 MoUs wherein Scal was expected to make a payment of Rs. 2,290 crores over several years. I also find that the payment made by Scal towards the booking amount under the MoUs was financed through borrowings from various group companies of BDMCL and through external entities such DHFL, based on the intervention of BDMCL.

(h) BDMCL providing a comfort letter to DHFL for extending a loan of. Rs. 534.8 Crores to Scal with a commitment to not dispose of its shareholding in Scal till the loan is repaid, in its capacity as a shareholder and not as a Developer, indicates that BDMCL was, in fact, in control of Scal. DHFL sanctioned the aforesaid term loan to Scal, an entity whose net worth was Rs. 237.70 crores (negative) as on March 31, 2017 and which was making losses since last several years, on the basis of such comfort letter.

69. At this juncture, it is relevant to note the applicable provisions of law.

<u>Listing Agreement</u>

Clause 49 - Corporate Governance

The company agrees to comply with the following provisions:
...
...
...
II. <u>Audit Committee</u>
...
...
...
(D) Role of Audit Committee
The role of the audit committee shall include the following:

1. ***Oversight of the company's financial reporting process and the disclosure of its financial information to ensure that the financial statement is correct, sufficient and credible.***

Listing Agreement (post amendment dated April 17, 2014)

49. Corporate Governance
...

…
…

III. <u>Audit Committee</u>
…
…
…
D. Role of Audit Committee
The role of the Audit Committee shall include the following:

1. ***Oversight of the company's financial reporting process and the disclosure of its financial information to ensure that the financial statement is correct, sufficient and credible**;*

SEBI (LODR) Regulations, 2015

Audit Committee.
18. …
…
…
(3) The role of the audit committee and the information to be reviewed by the audit committee shall be as specified in Part C of Schedule II.

Repeal and Savings

103. (1) On and from the commencement of these regulations, all circulars stipulating or modifying the provisions of the listing agreements including those specified in Schedule X, shall stand rescinded.

(2) Notwithstanding such rescission, anything done or any action taken or purported to have been done or taken including any enquiry or investigation commenced or show cause notice issued in respect of the circulars specified in sub-regulation (1) or the Listing Agreements, entered into between stock exchange(s) and listed entity, in force prior to the commencement of these regulations, shall be deemed to have been done or taken under the corresponding provisions of these regulations.

SCHEDULE II: CORPORATE GOVERNANCE

…
…
…

PART C: ROLE OF THE AUDIT COMMITTEE AND REVIEW OF INFORMATION BY AUDIT COMMITTEE

A. The role of the audit committee shall include the following:

> ***(1) oversight of the listed entity's financial reporting process and the disclosure of its financial information to ensure that the financial statement is correct, sufficient and credible;***

70. From the aforesaid, it is clear that the role of the Audit Committee under the relevant provisions of law is very crucial.

B. <u>Role of members of Audit Committee</u>

71. I note that Noticee no. 1, Mr. R A Shah was an Independent Director of BDMCL and also a Member of the Audit Committee from FY 2011-12 to FY 2017-18. From the Annual Reports for FY 2011-12 to FY 2017-18 of BDMCL, I note that Mr. S S Kelkar (Noticee no. 2), was an Independent Director of BDMCL and a member of the Audit Committee. I note that Mr. S Ragothaman (Noticee no. 3) was an Independent Director of BDMCL and a member of the Audit Committee from FY 2011-12 to FY 2017-18. He was also the Chairman of the Audit Committee from FY 2011 – 2012 till November 13, 2013. From the Annual Reports for FY 2011-12 to FY 2017-18 of BDMCL, I note that Mr. S M Palia (Noticee no. 4), was an Independent Director of BDMCL and also a Member of the Audit Committee from FY 2011-12 to FY 2017-18. I note that Mr. Ishaat Hussain (Noticee no. 5), was an Independent Director of BDMCL and also a Member of the Audit Committee from FY 2011-12 to FY 2017-18. He was also the Chairman of the Audit Committee from November 14, 2013 till August 10, 2017.

72. I note that the Noticees reviewed the Annual Accounts of BDMCL which included Balance Sheet, Profit & Loss Account, Cash Flow Statement and Auditor's Report for FY 2011-12 to FY 2017-18, in their capacities of being the Audit Committee members.

73. In this regard, I note that the Audit Committee, under the erstwhile Clause 49 of the Listing Agreement and LODR Regulations, 2015 has been equipped with the powers to seek information from any employee, obtain outside legal or other professional advice, secure attendance of outsiders with relevant expertise, if it considers necessary.

74. I note that Noticees did not seek any explanation and did not provide any specific reason with respect to reduction in shareholding in Scal by BDMCL especially one day prior to entering into the MoUs with Scal which was the trigger point for the scheme being orchestrated by BDMCL to inflate its sales and revenue.

75. As noted above, BDMCL would have been required to prepare consolidated financial statements for the FY 2011-12 to FY 2013-14, if they held 50% or more shareholding in Scal or any other subsidiary in terms of Clause 41(I)(e)(ii) read with Clause 50 of the Erstwhile Listing Agreement. Further, AS-23, which stipulates criteria for accounting for investment in Associates, would have been applicable to BDMCL, only if the company had prepared consolidated financial statements. However, during the financial years 2011-12, 2013-14 and 2013 – 14, BDMCL did not have any subsidiary. Therefore, BDMCL was not required to prepare consolidated financial statements for the financial years 2011-12, 2013-14 and 2013 – 14. However, from 2014-15, and by virtue of the mandate under section 129 (3) of the Companies Act, 2013, and on account of the fact that for FY 2014 – 15 and 2015 – 16, BDMCL disclosed Archway as a "subsidiary company", it started preparing consolidated financial statements, and consequently the mandate to record the investments of BDMCL in Scal as per AS-23, also became applicable. I find that Scal was an 'associate' in terms of AS-23/ IndAS 28 and BDMCL was required to comply with AS-23/ IndAS 28, by virtue of the mandate under Section 129(1) of the Companies Act, 2013, Clause 50 of the Erstwhile Listing Agreement and Regulation 48 of SEBI (LODR) Regulations, 2015, and therefore, liable for accounting the sales made to Scal and the revenue generated therefrom to the extent of the BDMCL's interest in Scal. BDMCL failed to comply with the stipulations under these Accounting Standards, which would have mandated it to record the investments of BDMCL in Scal under the Equity Method (which would have eliminated the recording of sales of BDMCL to Scal). The Noticees have submitted that they have relied on the opinions provided by the Chartered Account firm. However, as noted above, BDMCL had not disclosed all the relevant information to the Chartered Accountant firm to give a true and correct view of whether Scal was an associate. The Noticees being Independent Directors and members of the Audit Committee of BDMCL should have realized the same and not relied on the Opinion of the Chartered Accountant firm without applying their mind.

76. In the absence of related party disclosures, there is a general presumption that transactions reflected in the financial statements have been entered into on an arm's length basis between independent parties. However, that presumption may not be valid when related party relationships exist because related parties may enter into transactions which unrelated parties would not enter into. During the financial years 2012 - 13 and 2013 -14 i.e. even in the financial years when BDMCL was holding 19% of the shareholding of Scal, BDMCL has indeed shown Scal as an associate company for the purpose of "related party disclosures". From FY 2014-15 onward, Scal was referred to as a "group company" by BDMCL in its Annual Reports. I note that for the FY 2014-15, the stipulations of related party disclosures were contained in the Erstwhile Listing Agreement (as amended from April 17, 2014) and for the FY 2015-16 to 2017-18, the SEBI (LODR) Regulations, 2015, became applicable from December 1, 2015. Based on the analysis in the abovementioned paragraphs, I find that BDMCL was exercising significant influence over Scal and therefore, BDMCL ought to have shown Scal as an "associate" for FY 2014 -15 in terms of the Erstwhile Listing Agreement (as amended from April 17, 2014) and from FY 2015- 16 to FY 2016- 17 in terms of SEBI (LODR) Regulations, 2015, which it failed to do. The Noticees have submitted that they have relied on the opinions provided by Mr. N. D. Gupta on whether Scal can be treated as "associate company" under AS – 18. However, as noted above, BDMCL had not disclosed all the relevant information to Mr. N. D. Gupta to enable him to give a true and correct view of whether Scal was an associate company or not. The Noticees being Independent Directors and members of the Audit Committee of BDMCL, right from the beginning of the Investigation Period, should have realized the same and not relied on the Opinion of Mr. N. D. Gupta without applying their mind.

77. I note that the Noticees failed to carry out adequate due diligence even when BDMCL entered into MoUs with Scal amounting to Rs. 3033 crores. The Noticees did not assess the current capability of Scal. Scal was a company having negative networth throughout the Investigation Period and that the payment made by Scal towards the booking amount under the MoUs was financed through borrowings from various group companies of BDMCL and through external entities such DHFL, based on the intervention of BDMCL. In fact, the first two MoUs dated March 30, 2012 pertaining

to One ICC and Two ICC between BDMCL and Scal wherein Scal had paid Rs. 13 Crores and Rs. 10 Crores as booking amount being the earnest money for allotment of flats were financed after receiving Rs. 8.09 Crores from BDMCL, itself and Rs. 23.73 Crores from Archway in FY 2011-12. The Noticees have argued that Scal was not required to have positive networth as it would have made payment soon after the receipt of funds from the retail customers, after the sale of flats. I note that if this were to be case, the same would run counter to the contention of the Noticees that Scal was a 'Bulk Buyer', wherein Scal is expected to bring in immediate cash flows into BDMCL.

78. I also note that the Noticees at no point sought any clarification as to why Scal did not pay any rent/ lease charges for maintaining its registered office in "Neville House, J. N. Heredia Marg, Ballard Estate, Mumbai- 400 001" which was owned by BDMCL.

79. I note that the Noticees have drawn reference to para 11 (e) of the Investigation Report whereby SEBI has observed that the auditor's role in directly/indirectly aiding in misrepresentation and non-disclosure of material information in consolidated financials of BDMCL during the IP has not been established and which is reproduced as under to contend that "Emphasis of Matter" contains a reference to the identified Note to Financial statement and based on the disclosures made in BDMCL's own Financial Statements made by BDMCL. The Noticees have submitted that if SEBI has concluded that BDMCL's statutory auditors had not committed any fraud or misrepresentation or lack of due diligence, SEBI ought to conclude that none of Noticees can be held guilty of lack of diligence. The relevant paragraph of the Investigation Report is reproduced as under:

> *(e) Kalyaniwalla Mistry & LLP were the Statutory Auditors of the Company during the Investigation Period when misrepresentation of financial statements of BDMCL took place. The auditors in the Independent Auditor's Report placed an "Emphasis of Matter" Paragraph in each of their report. The said "Emphasis of Matter" Paragraph contained the fact of recognizing revenue and profits by BDMCL based on MoUs entered into with Scal. Thus, while BDMCL devised a scheme of artificial inflation of sales and profits by way of entering into MoUs with Scal, the Statutory Auditor, in his limited capacity, highlighted the fact of recognizing revenue and profit by BDMCL by way of entering into MoUs with its Group Company. In view of the same, auditor's role in directly/indirectly aiding*

in misrepresentation and non-disclosure of material information in consolidated financials of BDMCL during the IP has not been established.

80. I note, for instance, in FY 2014 -15, the Independent Auditor's Report included a section titled "Emphasis of Matter" which drew attention to Note No. 36 of the financial statements and which is reproduced as under:

"Emphasis of Matters
We draw attention to:
1. *Note No. 36 to the financial statements regarding agreements to sell certain apartments in the proposed residential towers being constructed at Island City Centre to SCAL Services Ltd., a Group company, in terms of various MOUs entered between the companies till March 2015. The Company has during the year recognized net revenues of Rs. 301.11 crores (2013-14: Rs. 670.13 crores) and resultant profit before tax of Rs. 224.49 crores (2013-14: Rs. 355.45 crores) on sale of apartments to SCAL."*

81. The relevant Note No. 36 is also reproduced as under:

"36. The Company has agreed to sell several apartments in the proposed residential towers being constructed at Island City Centre to SCAL Services Ltd, a Group company, in terms of various Memorandum of Understanding (MOUs) entered between the companies till March 31, 2015. Based on the method of accounting (percentage of completion) followed by the company, net revenue of Rs. 301.11 crores (2013-14 Rs. 670.13 crores) and the resultant profit before tax of Rs. 224.49 crores (2013-14 Rs. 355.45 crores) has been recognised during the year ended March 31,2015 on sales to SCAL."

82. It is the Noticees' case that for each financial year during the IP, the financial statements contained disclosures including the fact that during the year, BDMCL had executed MoUs with Scal and that Scal was a group company. Further, the Noticees have contended that if the Statutory Auditors may be concluded not to have committed any fraud or misrepresentation, similar principle may be applied to the Noticees.

83. As noted above, the the entire shareholding of Scal was structured in a manner to camouflage the actual shareholding of BDMCL in Scal. By holding its entire shareholding in Scal through various other investment companies of Wadia Group, BDMCL was exercising control over Scal directly/ indirectly. Based on the above analysis, I note that BDMCL ought to have disclosed Scal as an "associate company" and prepared consolidated financial statements from FY 2014-15which would have

eliminated the recording of sales of BDMCL to Scal, which it failed to do. I note that BDMCL also failed to disclose Scal as a related party from FY 2014-15 as was done for FY 2012- 13 and FY 2013 – 14. In this regard, I note that "Emphasis of Matter" is an additional communication in the auditor's report when the auditor considers it necessary to draw users' attention to a matter or matters presented or disclosed in the financial statements that are of such importance that they are fundamental to users' understanding of the financial statements. By incorporating the section on "Emphasis of Matter", the Statutory Auditors in their limited capacity, highlighted the fact of recognition of sales made to Scal and corresponding profit recognized. The Noticees were members of Audit Committee right from the beginning of the Investigation Period and considering the role of the members of audit committee as stipulated in the Erstwhile Listing Agreement as well as the LODR Regulations, I note that the Noticees clearly failed to comply with the applicable provisions of law. Therefore, I am unable to accept the argument that they should be treated on par with the statutory auditors of the company merely because BDMCL had declared Scal as a "group company" and disclosed the revenue recognized by it pursuant to the MoUs entered with Scal.

84. In order to understand the role of the members of the Audit Committee, it is important to look at its genesis. I note that in 1999, SEBI had appointed a committee under the Chairmanship of Shri Kumar Mangalam Birla to promote and raise the standards of corporate governance. The recommendations of the Kumar Mangalam Birla Committee led to the insertion of Clause 49[11] in the Listing Agreement vide SEBI Circular no. SMDRP/POLICY/CIR-10/2000 dated February 21, 2000. One of such mandatory recommendations was that "***a qualified and independent audit committee should be set up by the board of a company. This would go a long way in enhancing the credibility of the financial disclosures of a company and promoting transparency***". In this regard, the Kumar Mangalam Birla Committee had observed as under:

[11] Clause 49 was amended in 2014 vide Circular bearing no. CIR/CFD/POLICY CELL/2/2014 dated April 17, 2014, Clause 49 was amended to align it with the with the provisions of the Companies Act, 2013.

9.2 The Committee is of the view that the need for having an audit committee grows from the recognition of the audit committee's position in the larger mosaic of the governance process, as it relates to the oversight of financial reporting.
9.3 A proper and well functioning system exists therefore, when the three main groups responsible for financial reporting – the board, the internal auditor and the outside auditors – form the three-legged stool that supports responsible financial disclosure and active and participatory oversight. ***The audit committee has an important role to play in this process, since the audit committee is a subgroup of the full board and hence the monitor of the process****….* ***The committee's job is clearly one of oversight and monitoring and in carrying out this job it relies on senior financial management and the outside auditors.***

85. I note that the Noticees had an important role to play as members of the Audit Committee and as a sub group of the Board of Directors. The Noticees were required to monitor the disclosures and accuracy of the same as a monitor of the process. As a result of the Noticees' failure to discharge their function as members of the audit committee, BDMCL was able to inflate its sales and profits with respect to its real estate segment to the tune of Rs. 2,492.94 crores and Rs. 1,302.20 crores respectively. In view of the above, I find that the Noticees have failed in its duty to exercise oversight of BDMCL's financial reporting process and disclosure of its financial information to ensure that the financial statement is correct, sufficient and credible. Therefore, I hold that the Noticees have violated the provisions of Clause 49(II)(D)(1) of the Listing Agreement, Clause 49(III)(D)(1) of the Listing Agreement (post amendment dated April 17, 2014) read with Regulation 103 of the SEBI (LODR) Regulations, 2015 and Regulation 18(3) read with Clause A (1) under Part C of Schedule II of SEBI (LODR) Regulations, 2015 for the period from FY 2014 – 15 to FY 2017 -18.

C. Analysis of Role of Chief Financial Officers of BDMCL

86. At this juncture, it is relevant to note the applicable provisions of law.

Listing Agreement

Clause 49 - Corporate Governance

The company agrees to comply with the following provisions:
…
…

…

V. CEO/CFO certification

The CEO, i.e. the Managing Director or Manager appointed in terms of the Companies Act, 1956 and the CFO i.e. the whole-time Finance Director or any other person heading the finance function discharging that function shall certify to the Board that:

(a)They have reviewed financial statements and the cash flow statement for the year and that to the best of their knowledge and belief:

> ***(i) these statements do not contain any materially untrue statement or omit any material fact or contain statements that might be misleading;***
>
> ***(ii) these statements together present a true and fair view of the company's affairs and are in compliance with existing accounting standards, applicable laws and regulations.***

Listing Agreement (post amendment dated April 17, 2014)

49. Corporate Governance

…

…

…

IX. CEO/CFO certification

The CEO, i.e. the Managing Director or Manager appointed in terms of the Companies Act, 1956 and the CFO i.e. the whole-time Finance Director or any other person heading the finance function discharging that function shall certify to the Board that:

A. They have reviewed financial statements and the cash flow statement for the year and that to the best of their knowledge and belief:

> ***1. these statements do not contain any materially untrue statement or omit any material fact or contain statements that might be misleading;***
>
> ***2. these statements together present a true and fair view of the company's affairs and are in compliance with existing accounting standards, applicable laws and regulations.***

SEBI (LODR) Regulations, 2015

Board of Directors.

17.

…

…

…

(8) The chief executive officer and the chief financial officer shall provide the compliance certificate to the board of directors as specified in Part B of Schedule II.

Repeal and Savings

103. (1) On and from the commencement of these regulations, all circulars stipulating or modifying the provisions of the listing agreements including those specified in Schedule X, shall stand rescinded.

(2) Notwithstanding such rescission, anything done or any action taken or purported to have been done or taken including any enquiry or investigation commenced or show cause notice issued in respect of the circulars specified in sub-regulation (1) or the Listing Agreements, entered into between stock exchange(s) and listed entity, in force prior to the commencement of these regulations, shall be deemed to have been done or taken under the corresponding provisions of these regulations.

SCHEDULE II: CORPORATE GOVERNANCE

...
...
...

PART B: COMPLIANCE CERTIFICATE

The following compliance certificate shall be furnished by chief executive officer and chief financial officer:

A. They have reviewed financial statements and the cash flow statement for the year and that to the best of their knowledge and belief:

(1) these statements do not contain any materially untrue statement or omit any material fact or contain statements that might be misleading;

(2) these statements together present a true and fair view of the listed entity's affairs and are in compliance with existing accounting standards, applicable laws and regulations.

87. The details of Chief Financial Officers of BDMCL during the Investigation Period are as follows:

Table No. 17

S. No.	Name of the CFO	Category	Begin Date	End Date
1	Mr. Raghuraj Balakrishna	CFO	October 22, 2012	August 08, 2014
2	Mr. Vinod Hiran	CFO	May 19, 2015	November 02, 2015
3	Mr. Pushpamitra Das	CFO	April 04, 2016	June 30, 2017
4	Mr. Vishnu Peruvemba	CFO	January 05, 2018	August 31, 2019

88. The details of persons who have signed the CEO/CFO Certification for BDMCL during the IP are as follows:

Table no. 18

S. No.	FY	CEO/CFO Certification required under	CEO/CFO Certification signed by
1	2011-12	Clause 49(V) of the Listing Agreement	Mr. Durgesh Mehta
2	2012-13		Mr. Durgesh Mehta and Mr. Raghuraj Balakrishna
3	2013-14		Mr. Jehangir N Wadia and Mr. Raghuraj Balakrishna
4	2014-15	Clause 49(IX) of the Listing Agreement	Mr. Jehangir N Wadia and Mr. Vinod Hiran
5	2015-16	Regulation 17(8) of SEBI (LODR) Regulations, 2015	Mr. Jehangir N Wadia and Mr. Pushpamitra Das
6	2016-17		Mr. Jehangir N Wadia and Mr. Pushpamitra Das
7	2017-18		Mr. Jehangir N Wadia and Mr. Vishnu Peruvemba

89. In terms of Clause 49(V) of the Listing Agreement/ Clause 49 (IX) of the Listing Agreement/ Regulation 17(8) of SEBI (LODR) Regulations, 2015, the CFO of a listed company is required to certify that the financial statements of the company do not contain any materially untrue statement or omit any material fact or contain statements that might be misleading; and that the statements together present a true and fair view of the company's affairs and are in compliance with existing accounting standards, applicable laws and regulations.

90. From the above Table no. 18, I note that Mr. Raghuraj Balakrishna, (Noticee no. 6) signed the financial statements of BDMCL as well as CEO/CFO Certification as required under Clause 49 (V) of the Listing Agreement for FY 2012 – 13 and FY 2013-14. Mr. Vinod Hiran (Noticee no. 7) signed the financial statements as well as CEO/CFO Certification as required under Clause 49 (IX) of the Listing Agreement for FY 2014-15. Mr. Puspamitra Das (Noticee no. 8), who was employed as CFO by BDMCL from April 2016 to June 2017, and signed financial statements of BDMCL for FY 2015-16 and FY 2016-17 and also CEO/CFO Certification as required under Regulation 17(8) of SEBI LODR Regulations, 2015 for FY 2015-16 and FY 2016-17.

Mr. Vishnu Peruvemba (Noticee no. 9) signed CEO/CFO Certification as required under Regulation 17(8) of SEBI LODR Regulations, 2015 for FY 2017-18. The Noticee no. 9 in his statement recorded on January 13, 2021 (Annexure 13D to SCN) stated that BDMCL accounted for the revenue as per the defined accounting guidelines and standards. Scal was a bulk buyer and operated independently through its own Board of Directors. It is noted from their submissions that the Noticees were aware of the transactions between BDMCL and Scal, shareholding pattern of Scal and also the reasons for non-consolidation of Scal with BDMCL.

91. As noted above, BDMCL, along with Scal, executed a scheme to record non-genuine sales made to Scal to the tune of Rs. 2,492.94 crores and profits to the tune of Rs. 1,302.20 crores during FY 2011-12 to FY 2017-18 by entering into MoUs with Scal. During the said period, the entire shareholding of Scal was structured in a manner to camouflage the actual shareholding of BDMCL in Scal. By holding its entire shareholding in Scal through various other investment companies of Wadia Group, BDMCL was exercising control over Scal directly/ indirectly. This is further evinced by the fact that Scal did not have any independent office during the Investigation Period and operated from "Neville House, J. N. Heredia Marg, Ballard Estate, Mumbai- 400 001" which was owned by BDMCL without paying any rent/ lease charges. Furthermore, the directors of Scal namely, Mr. D S Gagrat, Mr. R Chandrasekharan, Mr. N H Datanwala and Mr. Shailesh Karnik were also directors in other Wadia group companies and admittedly, none of the directors received any remuneration for their role as directors of Scal which shows that they were directly/ indirectly controlled by Scal.

92. I find that that despite Scal having negative net worth throughout financial years 2011-12, 2012- 13 and 2013 – 14 i.e. Rs. 3 crores, Rs. 14 crores and Rs. 42 crores, BDMCL entered into total 11 MoUs wherein Scal was expected to make a payment of Rs. 2,290 crores over several years. I also find that the payment made by Scal towards the booking amount under the MoUs was financed through borrowings from various group companies of BDMCL and through external entities such DHFL, based on the intervention of BDMCL.

93. BDMCL providing a comfort letter to DHFL for extending a loan of. Rs. 534.8 Crores to Scal with a commitment to not dispose of its shareholding in Scal till the loan is repaid, in its capacity as a shareholder and not as a Developer, indicates that BDMCL was, in fact, in control of Scal. It is based on the faith of that letter, DHFL sanctioned the aforesaid term loan to Scal, an entity whose net worth was Rs. 237.70 crores (negative) as on March 31, 2017 and which was making losses since last several years.

94. BDMCL would have been required to prepare consolidated financial statements for the FY 2011-12 to FY 2013-14, if they held 50% or more shareholding in Scal or any other subsidiary in terms of Clause 41(I)(e)(ii) read with Clause 50 of the Erstwhile Listing Agreement. Further, AS-23, which stipulates criteria for accounting for investment in Associates, would have been applicable to BDMCL, only if the company had prepared consolidated financial statements. However, during the financial years 2011-12, 2013-14 and 2013 – 14, BDMCL did not have any subsidiary. Therefore, BDMCL was not required to prepare consolidated financial statements for the financial years 2011-12, 2013-14 and 2013 – 14. However, from 2014-15, and by virtue of the mandate under section 129 (3) of the Companies Act, 2013, and on account of the fact that for FY 2014 – 15 and 2015 – 16, BDMCL disclosed Archway as a "subsidiary company", it started preparing consolidated financial statements, and consequently the mandate to record the investments of BDMCL in Scal as per AS-23, also became applicable. I find that Scal was an 'associate' in terms of AS-23/ IndAS 28 and BDMCL was required to comply with AS-23/ IndAS 28, by virtue of the mandate under Section 129(1) of the Companies Act, 2013, Clause 50 of the Erstwhile Listing Agreement and Regulation 48 of SEBI (LODR) Regulations, 2015, and therefore, liable for accounting the sales made to Scal and the revenue generated therefrom to the extent of the BDMCL's interest in Scal. BDMCL failed to comply with the stipulations under these Accounting Standards, which would have mandated it to record the investments of BDMCL in Scal under the Equity Method (which would have eliminated the recording of sales of BDMCL to Scal).

95. In the absence of related party disclosures, there is a general presumption that transactions reflected in the financial statements have been entered into on an arm's length basis between independent parties. However, that presumption may not be

valid when related party relationships exist because related parties may enter into transactions which unrelated parties would not enter into. During the financial years 2012 - 13 and 2013 -14 i.e. even in the financial years when BDMCL was holding 19% of the shareholding of Scal, BDMCL has indeed shown Scal as an associate company for the purpose of "related party disclosures". From FY 2014-15 onward, Scal was referred to as a "group company" by BDMCL in its Annual Reports. I note that for the FY 2014-15, the stipulations of related party disclosures were contained in the Erstwhile Listing Agreement (as amended from April 17, 2014) and for the FY 2015-16 to 2017-18, the SEBI (LODR) Regulations, 2015, became applicable from December 1, 2015. Based on the analysis in the abovementioned paragraphs, I find that BDMCL was exercising significant influence over Scal and therefore, BDMCL ought to have shown Scal as an "associate" for FY 2014 -15 in terms of the Erstwhile Listing Agreement (as amended from April 17, 2014) and from FY 2015- 16 to FY 2016- 17 in terms of SEBI (LODR) Regulations, 2015, which it failed to do.

96. As regards, Noticee no. 6, Mr. Raghuraj Balakrishna, I note from the above Table no. 18, that Noticee no. 6 signed the CEO/CFO Certification as required under Clause 49 (V) of the Listing Agreement for FY 2012 – 13 and FY 2013-14. However, I note that for the said period, BDMCL disclosed Scal as a related party being an "associate company" for the purpose of related party disclosures in its Annual Report for FY 2012 – 13 and FY 2013-14 and also disclosed the sale arrangement between itself and Scal. Furthermore, as observed in paragraph 94 above, during the financial years 2011-12, 2013-14 and 2013 – 14, BDMCL did not have any subsidiary and therefore, not required to prepare consolidated financial statements for the financial years 2011-12, 2013-14 and 2013 – 14 in terms of Clause 41(I)(e)(ii) read with Clause 50 of the Erstwhile Listing Agreement. As a result, the criteria for accounting for investment in associates as stipulated in AS – 23 was also applicable. In view of the above, I find that the allegations against Noticee no. 6, Mr. Raghuraj Balakrishna are not established. Therefore, I exonerate Noticee no. 6 from the current proceedings without levying any penalty and dispose of the SCN issued against him in the matter.

97. Mr. Vinod Hiran (Noticee no. 7) has submitted that he joined BDMCL as the CFO on May 19, 2015 and left BDMCL on November 02, 2015. He also submitted that after

the financial statements of BDMCL for FY 2014-15 were approved by the Board of Directors after audit by the Statutory Auditors, he was asked to sign the same just within a week of his joining and he did not have sufficient time to read or understand the same. On being asked to sign the financial statements as CFO, he signed the same as he had no idea about any wrong doing by the Company/Promoters. It was also submitted by him that if he would have been aware that time that entire shareholding of Scal was being held directly or indirectly by BDMCL and its associates, he would not have agreed to sign the declaration about true and fair account for 2014-15 unless complete disclosure about the same would have been made in the accounts of that year and impact of this fact would have been accounted for in the consolidated accounts for that year. Mr. Puspamitra Das (Noticee no. 8) in his statement recorded on January 12, 2021 has stated that he joined BDMCL in April 2016, at which point the financial statements were already drawn up for FY 2015-16 and due to paucity of time, he did not review the financial statements for FY 2015-16. I also note from his submissions that the Noticee was aware of the shareholding of BDMCL in Scal and stated that the accounts were drawn up by BDMCL in accordance with the relevant accounting standards. Noticee no. 9, Mr. Vishnu Perumba, in his statement recorded on January 13, 2021 has submitted that Scal is an independent entity and operates independently and BDMCL has accounted for the revenue as per the defined accounting guidelines and standards.

98. I note that CFOs are expected to ensure compliance with the financial reporting, other regulatory and legal requirements which has been captured in Clause 49(V) of the Listing Agreement/ Clause 49 (IX) of the Listing Agreement/ Regulation 17(8) of SEBI (LODR) Regulations, 2015. In this role, the CFO is also required to communicate with the investors in a fair and transparent manner and thereby, enhance the investor's trust and confidence. Therefore, the CFOs have a critical role to play in the scheme of the things under the erstwhile Listing Agreement and the LODR Regulations. Based on the aforesaid analysis, I note that the Noticees have clearly violated the duty cast upon them.

99. In view of the above, I find that the Noticee nos. 7 to 9 signed the CEO/CFO Certification to the Board of BDMCL for the respective financial years as noted above

and violated the following provisions which required them to certify that the financial statements of the company do not contain any materially untrue statement or omit any material fact or contain statements that might be misleading; and that the statements together present a true and fair view of the company's affairs and are in compliance with existing accounting standards, applicable laws and regulations. Furthermore, I note that Clause 49 (IX) (A) of the Listing Agreement (post amendment dated April 17, 2014) and Clause A of Part B of Schedule II of the LODR Regulations clearly state that CFO shall certify to the Board that "they have reviewed the financial statements". Therefore, the Noticee nos. 7 and 8 cannot absolve themselves from the liability on the ground that they could not review the financial statements.

(a) Mr. Vinod Hiran violated Clause 49 (IX) of the Listing Agreement (post amendment dated April 17, 2014) read with Regulation 103 of the SEBI (LODR) Regulations, 2015 and
(b) Mr. Pushpamitra Das and Mr. Vishnu Peruvemba violated Regulation 17(8) & 33(2)(a) of the SEBI (LODR) Regulations, 2015.

100. I note that the Noticee nos. 7 to 9 have also contended that if SEBI has concluded that BDMCL's statutory auditors had not committed any fraud or misrepresentation or lack of due diligence, SEBI ought to conclude that none of Noticees can be held guilty of lack of diligence. As noted above, the the entire shareholding of Scal was structured in a manner to camouflage the actual shareholding of BDMCL in Scal. By holding its entire shareholding in Scal through various other investment companies of Wadia Group, BDMCL was exercising control over Scal directly/ indirectly. Based on the above analysis, I note that BDMCL ought to have disclosed Scal as an "associate company" and prepared consolidated financial statements from FY 2014 – 15 which would have eliminated the recording of sales of BDMCL to Scal. I also note that BDMCL also did not disclose Scal as a related party from FY 2014 – 15 as was done for FY 2012- 13 and FY 2013 – 14. In this regard, I note that "Emphasis of Matter" is an additional communication in the auditor's report when the auditor considers it necessary to draw users' attention to a matter or matters presented or disclosed in the financial statements that are of such importance that they are fundamental to users' understanding of the financial statements. By incorporating the section on "Emphasis

of Matter", the Statutory Auditors in their limited capacity, highlighted the fact of recognition of sales made to SCAL and corresponding profit recognized. The Noticees were CFOs of BDMCL and considering their role as stipulated in the Erstwhile Listing Agreement as well as the LODR Regulations, I note that the Noticee nos. 7 to 9 clearly failed to comply with the applicable provisions of law. Therefore, I find that the Noticee nos. 7 to 9 cannot be treated on par with the Statutory Auditors.

Delay in issuance of SCN:

101. The Noticees in their reply dated May 30, 2022 have stated that the SCN dated August 30, 2021, with respect to the alleged violations that took place in FY 2022 – 12 to FY 2018 -19, has been issued after a delay of 9 years. The Noticees have submitted that there has been an inordinate delay in issuing the SCN and therefore, imposition of penalty would be unjustified and arbitrary. In this regard, the Noticees have placed reliance on the orders of the Hon'ble Securities Appellate Tribunal (hereinafter referred to as "SAT") in (i) Rajeev Bhanot & Ors. v. SEBI (Appeal No. 396 of 2018), (ii) ICICI Bank v. SEBI (Appeal No. 583 of 2019) and (iii) Ashok Shivlal Rupani v. (Appeal no. 417 of 218).

102. I have perused the orders stated above, however, as regards the question of delay, I note that it is pertinent to quote the observations of the Hon'ble Supreme Court in ***SEBI* v. *Sunil Khaitan*** (Civil Appeal No. 8249 of 2013) wherein it was stated as under:

> *In the absence of any period of time and limitation prescribed by the enactment, every authority is to exercise power within a reasonable period.* ***What would be the reasonable period would depend upon facts of each case, such as whether the violation was hidden and camouflaged and thereby the Board or the authorities did not have any knowledge****. Though, no hard and fast rules can be laid down in this regard as determination of the question will depend on the facts of each case, the nature of the statute, the rights and liabilities thereunder and other consequences, including prejudice caused and whether third party rights have been created are relevant factors. Whenever a question with regard to inordinate delay in issuance of a show-cause notice is made, it is open to the noticee to contend that the show-cause notice is bad on the ground of delay and it is the duty of the authority/officer to consider the question objectively, fairly and in a rational manner.*

103. I note that SEBI received a SCORES complaint bearing no. SEBIE/MH19/0000046/1 dated January 03, 2019 against BDMCL from Mr. Rohit Mansukhani (hereinafter referred to as "Complainant"). The said complaint was followed by 2 more similar complaints made by the Complainant during January 2019 to December 2019. On the basis of the aforementioned complaints, an investigation was initiated in the matter of to *inter-alia* examine possible violation of the provisions of the SEBI Act, 1992, SEBI (PFUTP) Regulations, 2003, SEBI (LODR) Regulations, 2015 and Listing Agreement during FY 2011-12 to FY 2018-19.

104. I note from the investigation report which was shared with the Authorized Representative of the Noticees, that the investigation involved examining the Annual Reports of BDMCL, Scal and group companies of BDMCL, the Investigating Authority also recorded statements of persons such as Mr. Durgesh Mehta, Joint Managing Director and Chief Financial Officer (hereinafter referred to as "CFO") of BDMCL, Mr. N H Datanwala, Director of Scal, Mr. Vinod Hiran, CFO of BDMCL, Mr. Vishnu Peruvemba, CFO of BDMCL, entering in correspondence with BDMCL, its directors and auditors, Scal etc., examining their replies etc. Accordingly, the Investigation Report was prepared and finalized in June 2021. Thereafter, after examining the relevant evidence, SCN dated August 31, 2021 was issued to the Noticees.

105. In view of the above, I note that SEBI became aware of the scheme devised by BDMCL along with Scal upon receiving a SCORES complaint in 2019. I note that the scheme was devised in such a manner that it would not be easily detected by any regulatory body. Furthermore, the present proceedings have been initiated under Section 15-I of the SEBI Act and the violation, if established, would make the Noticees liable for imposition of penalty. Therefore, I note that no third party rights would be affected by an order under the instant proceedings. Therefore, keeping in mind the observations of the Hon'ble Supreme Court in ***SEBI* v. *Sunil Khaitan***, I find that the contention of the Noticees that there has been an inordinate delay in issuing the SCN, and therefore, imposition of penalty is arbitrary is not tenable.

SCN is premature:

106. The Noticees in their reply dated May 30, 2022 have stated that an SCN bearing no. SEBI/HO/CFID/CFID1/OW/P/2021/12045/1-10 dated June 11, 2021 was issued under Sections 11 and 11B of the SEBI Act inter alia to BDMCL based on the same underlying facts as the SCN dated August 30, 2021 and alleged violations of the provisions of SEBI (Prevention of Fraudulent and Unfair Trade Practices) Regulations, 2003 (hereinafter referred to as "PFUTP Regulations"), LODR Regulations and the Listing Agreement. The Noticees have submitted that the SCN dated August 30, 2021 is only derivative of any violation that BDMCL may be adjudged to have committed. In this regard, the Noticees have submitted that as the SCN dated June 11, 2021 is pending adjudication, it is inappropriate to pursue the present SCN before the said SCN is adjudicated upon.

107. I note that the proceedings initiated under Sections 11 and 11B is independent and distinct from adjudicating proceedings which is initiated under Section 15-I of the SEBI Act. The directions issued under Section 11B after due investigation under Section 11C are remedial in nature. On the other hand, the proceedings under Section 15I under Chapter VI-A of the SEBI Act, provide a mechanism whereby the AO may impose penalties for various violations if committed under the Act or Regulations framed therein. Therefore, I am not inclined to accept the Noticees' contention that it would be inappropriate to pursue the present SCN before the SCN dated June 11, 2021 is adjudicated upon. Having said so, I also note that SCN bearing no. SEBI/HO/CFID/CFID1/OW/P/2021/12045/1-10 dated June 11, 2021 has been disposed of by the Whole Time Member (hereinafter referred to as "WTM") of SEBI vide order dated October 21, 2022 wherein the WTM has observed in paragraph 27 of the order that:

> *26… the shareholding in Scal was deliberately designed in such a manner that even though BDMCL directly held only 19% in the share capital of Scal, but indirectly it was able to exercise control over the entire share capital of Scal. Further, as held in the preceding paragraph, the board of Scal was not independent, it was under the influence of BDMCL/ Wadia Group. Until FY 2017-18, Scal and BDMCL had the same registered office address and Scal had the same telephone no. as that of BDMCL. Scal did not pay any rent/lease charges to*

BDMCL for the use of office premises. This shows that Scal was nothing but an extended arm of BDMCL itself. During the FY 2011-12 to 2017- 18, Scal carried out all of its transactions with BDMCL only. In view of the forgoing analysis and after considering the finding that the sale of flats to Scal was merely an eyewash, I find merit in the allegation of the SCN that a deliberate Scheme was devised to fraudulently misrepresent the financial statements of BDMCL, by recognizing revenue and booking profits, by showing sales of flats to Scal (which as it turned out were non-genuine), over the period from FY 2011-12 to FY 2017- 18. Scal was an entity, whose share capital was entirely under the control of BDMCL. Noticee no. 1's direct shareholding in Scal was deliberately retained at 19% (i.e. 1% less than 20%), in order to circumvent the compliance with Section 129(3) of the Companies Act, 2013 and with AS-23 r/w. Section 129(1) of the Companies Act, 2013, which if kept at 20% would have led to the consolidation of financial statements of Scal, with that of BDMCL, thereby reducing the revenue and profit of BDMCL, since as per AS-23, sales from BDMCL to Scal cannot be recorded as part of revenue while preparing the consolidated financial statements of BDMCL.

27.I note that by hatching into this deliberate scheme of fraudulent misrepresentation of financial statements, BDMCL was able to inflate its sales by Rs. 2,492.94 Crores and consequent profit by Rs. 1,302.02 Crores, over the period from FY 2011-12 to 2017-18. I note that investors rely on the financial disclosures made by the company, to make their investment / disinvestment decisions. Had the correct picture of the financial position of BDMCL been made public, the share price of BDMCL would not have maintained same trajectory as it did for the period from FY 2011-12 to FY 2017-18. In view of the above, I find that, by engaging in the act and practice of deliberate misrepresentation of financial statements, which operated as a fraud upon investors in the securities market, Noticee no. 1 has violated the provisions of Section 12A(c) of the SEBI Act, 1992 and Regulation 3(d) of the PFUTP Regulations, 2003. I also note that the act of deliberate misrepresentation of financial statements was also fraudulent and unfair trade practice in securities, thus, I find that, Noticee no. 1 has also violated the provisions of Regulation 4(1) of PFUTP Regulations, 2003. By recording those inflated sales and profits, BDMCL was able to put up the gloomy picture of a "consistent profit making enterprise, showing the promise of a thriving real estate business" and thus maintain its share price in the same trajectory for the period 2011-12 to 2017-18. I note that this amounted to manipulation of the price of the scrip of BDMCL and thus I find that Noticee no. 1 has violated the provisions of Regulations 4(2)(e) of PFUTP Regulations, 2003. I note that by publishing and reporting the financial statements of BDMCL to the stock exchange on quarterly and annual basis, which were misrepresented, I find that Noticee no. 1 has violated the provisions of Reg. 4(2)(f) of PFUTP Regulations, 2003. I note that the reporting of the misrepresented financial results of BDMCL on quarterly and annual basis to the stock exchange under Regulation 30 of SEBI (LODR) Regulations, 2015, tantamounted to an act of 'planting misleading news which may induce sale/ purchase of securities', thereby resulting into the violation of Regulation 4(2)(r) of PFUTP Regulations, 2003 by Noticee no. 1.

Issue No. III: Does the violation, if any, by the Noticees attract monetary penalty under Section 15 HB of the SEBI Act?

108. The Noticees have been called upon to show cause as to why penalty under Section 15HB of the SEBI Act may not be imposed on them. The same is reproduced as under:

> ***"Penalty for contravention where no separate penalty has been provided.***
>
> *15HB. Whoever fails to comply with any provision of this Act, the rules or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to a penalty which shall not be less than one lakh rupees but which may extend to one crore rupees."*

109. The Noticees have contended that section 15HB is a residuary section providing for a penalty "for contravention where no separate penalty has been provided". In this regard, the Noticees have relied on the text in *Bennion on Statutory Interpretation (5th Edn.)*, with respect to the "Principle against doubtful penalization" to show that:

(a) No person should be penalized "except under clear law"
(b) An adjudicator faced by an action under such law, "should presume that the legislator intended to observe this principle" and thus, "strive to avoid adopting a construction which penalizes a person where the legislator's intention to do so is doubtful, or penalizes him or her in a way which was not made clear".
(c) This task should be performed regardless of "whether the ambiguity arises under criminal or civil law".
(d) The decisive question is, will the consequence of the action be one that "inflicts hardship or depravation of any kind", if the answer be (as it here, is) 'yes', the Principle must apply.
(e) The force with which it shall apply, bears a direct relation to the degree of detriment, thus, "if the detriment is severe, the principle will be correspondingly powerful."
(f) In such cases, "those who contend that a penalty must be inflicted (here, SEBI) must show that the words of the Act distinctly enact that it shall be incurred under the present circumstances"; and
(g) If the words in question are "merely equally capable of a construction that would, and one that would not inflict the penalty", the prosecution must fail".

110. I note from the Annexure 1 to the Written Submission dated July 11, 2022 wherein the relevant pages of Bennion have been annexed. The Principle against penalisation under a doubtful law is laid down as under:

> *It is a principle of legal policy that a person should not be penalised except under clear law (in this Code called the principle against doubtful penalisation. The court, when considering, in relation to the facts, of the instant case, which of the opposing constructions of the enactment would give effect to the legislative intention, should presume that the legislator intended to observe this principle. It should therefore strive to avoid adopting a construction which penalises a person where the legislator's intention to do so is doubtful, or penalises him or her in a which was not made clear.* ***<u>In some cases, however the court may find that the intention to impose the detriment was so strong as to require the doubt to be overridden.</u>***

111. I note that the Noticee nos. 1 to 5 have failed to carry out adequate due diligence and exercise independent judgement as members of the Audit Committee of a listed company, to ensure that financial statements are free from material misstatement, and therefore, violated the provisions of Clause 49(II)(D)(1) of the Listing Agreement, Clause 49(III)(D)(1) of the Listing Agreement (post amendment dated April 17, 2014) read with Regulation 103 of the SEBI (LODR) Regulations, 2015 and Regulation 18(3) read with Clause A (1) under Part C of Schedule II of SEBI (LODR) Regulations, 2015. The Noticee nos. 7 to 9 in their capacities as CFO of BDMCL have issued certificate in the Annual Reports of BDMCL during the IP *inter-alia* certifying that the financials of BDMCL presented true and fair view of its affairs and did not contain any misleading statement, and therefore, violated the respective relevant provisions of securities laws, as given below:
    (a) Mr. Vinod Hiran violated Clause 49(IX) of the Listing Agreement (post amendment dated 17/04/2014) read with Regulation 103 of the SEBI (LODR) Regulations, 2015 and
    (b) Mr. Pushpamitra Das and Mr. Vishnu Peruvemba violated Regulation 17(8) & 33(2)(a) of the SEBI (LODR) Regulations, 2015.

112. I note that the roles and responsibilities of the Noticees have been clearly laid down in the aforesaid provisions of the SEBI (LODR) Regulations. The LODR Regulations, 2015 has been issued and implemented to ensure transparency and fair disclosures by all listed companies in India. In fact, *Bennion on Statutory Interpretation (5th Edn.)* itself states that ***<u>the court may find that the intention to impose the detriment was so strong as to require the doubt to be overridden.</u>*** Furthermore, Section 15HB of the SEBI Act states that "*whoever fails to comply with any provision of this Act, the rules*

or the regulations made or directions issued by the Board thereunder for which no separate penalty has been provided, shall be liable to a penalty." I also find that there is no ambiguity that the violation of the aforesaid provisions will attract liability under the SEBI Act. For the aforesaid reasons, I find that the principle of doubtful penalisation is not applicable in the present case.

113. For the aforesaid violations, I find that all the Noticees except Noticee no. 6, Mr. Raghuraj Balakrishna are liable to be imposed with appropriate penalty under Section 15HB of the SEBI Act, 1992.

Issue No. IV: If so, what should be the monetary penalty that can be imposed taking into consideration the factors mentioned in Section 15J of the SEBI Act?

114. For imposition of penalty under the provisions of the SEBI Act, 1992, Section 15J of the SEBI Act, 1992 provides as follows:

> *"**Factors to be taken into account while adjudging quantum of penalty.***
> *15J. While adjudging quantum of penalty under 15-I or section 11 or section 11B, the Board or the adjudicating officer shall have due regard to the following factors, namely: —*
> *(a) the amount of disproportionate gain or unfair advantage, wherever quantifiable, made as a result of the default;*
> *(b) the amount of loss caused to an investor or group of investors as a result of the default;*
> *(c) the repetitive nature of the default.*
> *Explanation. —For the removal of doubts, it is clarified that the power to adjudge the quantum of penalty under sections 15A to 15E, clauses (b) and (c) of section 15F, 15G, 15H and 15HA shall be and shall always be deemed to have been exercised under the provisions of this section."*

115. Regarding the factors of Section 15J of SEBI Act, 1992, I note that there is no assessment in the SCN regarding the amount of disproportionate gain or unfair advantage gained by the Noticees, as a result of the alleged violation. Further, the SCN also does not specify the amount of loss caused to investor or group of investors, as the impact of camouflaging the scheme to inflate the revenue and sales of BDMCL, on the share price of a scrip, can hardly be assessed and recreated without the actual

events taking place in reality. I note that there is no material on record to indicate that the Noticees have been found to have committed similar violations any time in the past. I note that because of the failure of the Noticees to carry out their responsibilities laid down in the LODR Regulations, the revenues and profit of BDMCL were inflated by Rs. 2,492.94 crores and Rs. 1,302.20 crores, respectively, during the period from FY 2011-12 to FY 2017-18. Subsequently, Scal's real estate business was ultimately merged with BDMCL with effect from July 1, 2018. I find that as Noticee nos. 1 to 5 as members of the Audit Committee failed in their duty to exercise oversight of BDMCL's financial reporting process and disclosure of its financial information to ensure that the financial statement is correct, sufficient and credible. I find that as Noticee nos. 7 to 9 as CFOs wrongly certified that that the financial statements of the company do not contain any materially untrue statement or omit any material fact or contain statements that might be misleading; and that the statements together present a true and fair view of the company's affairs and are in compliance with existing accounting standards, applicable laws and regulations. I note that as a result of the same incorrect and misleading financial results have been published on the stock exchange under Regulation 30 of SEBI (LODR) Regulations, 2015 which have been relied upon by the investors of the securities market to make their investment decisions.

ORDER

116. In view of the above, after considering all the facts and circumstances of the case, the period of violation by the Noticees as stated in paragraph nos. 75, 76 and 90 of this order the factors mentioned in the provisions of Section 15-J of the SEBI Act, 1992 and in exercise of the power conferred upon me under section 15 – I of the SEBI Act, 1992 read with Rule 5 of Securities and Exchange Board of India (Procedure for Holding Inquiry and Imposing Penalties by Adjudicating Officer) Rules, 1995, I hereby impose the following penalties on the Noticees in terms of Sections 15 HB of the SEBI Act, 1992 for the aforesaid violations. In the facts and circumstances of the case, I am of the view that the said penalty is commensurate with the violations committed by the Noticees.

Noticee No.	Name of the Entity	Penalty Amount (in Rs.)
1	Mr. R.A. Shah	10,00,000
2	Mr. S.S. Kelkar	10,00,000
3	Mr. S. Ragothaman	10,00,000
4	Mr. S.M. Palia	10,00,000
5	Mr. Ishaat Hussain	10,00,000
7	Mr. Vinod Hiran	2,00,000
8	Mr. Puspamitra Das	5,00,000
9	Mr. Vishnu Peruvamba	2,00,000

117. The Noticees shall remit / pay the said amount of penalty within 45 days from from the date of receipt of this order either through online payment facility available on the SEBI website www.sebi.gov.in on the following path, by clicking on the payment link

ENFORCEMENT → Orders → Orders of AO → PAY NOW

OR

Through e-payment facility into Bank Account, the details of which are given below:

Bank Name	State Bank of India
Branch	Bandra - Kurla Complex
RTGS Code	SBIN0004380
Beneficiary Name	SEBI – Penalties Remittable To Government of India
Beneficiary A/c No.	31465271959

OR

By way of demand draft in favour of "SEBI-Penalties Remittable to Government of India", payable at Mumbai.

The Noticee shall forward the following details / confirmation of penalty so paid to the Chief General Manager, Enforcement Department 1, SEBI, Mumbai.

1. Case Name:	
2. Name of Payee: **3. Date of payment:**	
4. Amount Paid:	
5. Transaction No:	
6. Bank Details in which payment is made:	
7.Payment is made for:	**Penalty**

118. In terms of the provisions of Rule 6 of the Adjudication Rules, a copy of this order is sent to the Noticees and also to the Securities and Exchange Board of India.

Sd/-

October 31, 2022 **Dr. Anitha Anoop**

Mumbai **Adjudicating Officer &**

Chief General Manager